

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SMARTFLASH LLC and)
SMARTFLASH TECHNOLOGIES) DOCKET NO. 6:13cv447
LIMITED)

-vs-)

APPLE INC.) Tyler, Texas
9:28 a.m.
February 24, 2015

TRANSCRIPT OF TRIAL
ALL DAY
BEFORE THE HONORABLE RODNEY GILSTRAP,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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24 Proceedings taken by Machine Stenotype; transcript was
25 produced by a Computer.

1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 All right. Are the parties ready to read into the
6 record any items from the list of pre-admitted exhibits used
7 during yesterday's portion of the trial? I assume so, and
8 Plaintiff may proceed with their rendition.

9 MR. CASSADY: Thank you, Your Honor. The
10 Plaintiffs offer PX 24, PX 103.023, and PX 758.

11 And that's -- that's all, Your Honor.

12 THE COURT: Is there objection from the Defendant?

13 MR. POST: No objection, Your Honor.

14 THE COURT: Does Defendant have a similar list to
15 read into the record?

16 MR. POST: Yes, Your Honor.

17 THE COURT: Please proceed.

18 MR. POST: Defendants move to admit the following
19 exhibits into evidence: DX 346, DX 91, DX 102, DX 201, DX
20 205, DX 215, DX 350, DX 451, and DX 214, the last of which is
21 subject to the redactions ordered this morning during the
22 conference.

23 THE COURT: All right. Is there objection from the
24 Plaintiff?

25 MR. CASSADY: No, Your Honor. And just so the

1 Court is clear, I reviewed the documents they redacted and
2 it's --

3 THE COURT: It comports with the Court's
4 instruction?

5 MR. CASSADY: Yes, Your Honor.

6 THE COURT: All right. Thank you.

7 All right. We will then move to the formal charge
8 conference.

9 After the close of evidence yesterday and after
10 having heard the parties' various motions offered under Rule
11 50(a), the Court proceeded to hold an informal charge
12 conference with counsel for both parties in chambers, during
13 which time the Court reviewed the parties' various joint
14 submissions as to the final jury instructions and the verdict
15 form and heard wide-ranging input from both sides as to
16 various sections and portions, both in the joint submission
17 and any possible additions anyone cared to raise.

18 After that informal charge conference, the Court
19 carefully considered all the input from both sides as to each
20 of the issues raised, and prepared and generated the final
21 jury instructions and verdict form that are before the
22 parties now.

23 That form of the final jury instructions and
24 verdict form was delivered electronically to the parties
25 probably very close to midnight last night. It was about

1 that time when we got through.

2 The parties have had an opportunity since then to
3 review what the Court has sent, and the Court will now take
4 up and hear any objections as to those final jury
5 instructions and verdict form.

6 As I mentioned during the informal charge
7 conference yesterday evening, if we could have whoever is
8 going to speak for Plaintiff and Defendant on these matters
9 go to the podium and stay there jointly, it will save us time
10 as we go through these with any objections that either side
11 cares to offer.

12 So if counsel for each side that's going to address
13 the charge and the verdict form will go to the podium.

14 And we'll start with the final jury instructions.
15 Page 1 is the cover page with the style of the case. Page 2
16 begins the substance of the instructions.

17 Is there any objection from either side as to
18 either Page 1 or Page 2 of the final jury instructions?

19 MS. RAYMOND: Good morning, Your Honor. May it
20 please the Court.

21 With respect to Page 2, the second to last
22 paragraph, there's a statement that regard -- "and regard the
23 fact as provided (sic)," which refers to a stipulation; and
24 there we would propose "and regard the fact as provided
25 (sic)" be deleted due to the fact that the joint stipulation

1 on the non-infringing alternatives is simply that Apple has
2 not identified any non-infringing alternatives.

3 THE COURT: All right. Does Plaintiff have any
4 objection to either Page 1 or Page 2 of the verdict form --
5 of the -- excuse me, the final jury instructions?

6 MR. SUMMERS: No objection, Your Honor.

7 THE COURT: Okay. I'm going to overrule the
8 Defendant's objection to Page 2.

9 And we'll turn to Page 3 of the proposed final jury
10 instructions. Is there objection from either party to
11 anything on Page 3?

12 MS. RAYMOND: No objections, Your Honor.

13 MR. SUMMERS: No objection, Your Honor.

14 THE COURT: Anything on Page 4?

15 MS. RAYMOND: No objections, Your Honor.

16 MR. SUMMERS: No objections from the Plaintiff.

17 THE COURT: All right. Turning next to Page 5 of
18 the final jury instructions, either party wish to offer an
19 objection?

20 MS. RAYMOND: No, Your Honor.

21 MR. SUMMERS: No objection from the Plaintiff.

22 THE COURT: Next is Page 6 -- 6. Is there
23 objection from either party?

24 MS. RAYMOND: No objection, Your Honor.

25 MR. SUMMERS: No objection.

1 THE COURT: Turning to Page 7, is there objection
2 from either party?

3 MS. RAYMOND: Yes, Your Honor. On this page, Page
4 7, there is a reference in the first paragraph to method
5 claims. The method claims are no longer asserted in this
6 case, so we would propose deleting, "as well as method
7 claims."

8 Along the same lines in the second paragraph, the
9 second sentence, it says: Divided into parts or steps. We
10 would propose deletion of "or steps," again, because that's
11 seemingly a reference to method claims.

12 And then, finally, Your Honor, this page towards
13 the bottom says that Your Honor has determined the meaning of
14 certain claim terms; and that Your Honor has provided them to
15 the jury, those definitions. And we object to the claim
16 constructions and would incorporate our arguments that were
17 in our objections to the report and recommendation on claim
18 construction.

19 THE COURT: Well, with regard to the claim
20 construction, you're not waiving anything, Counsel, by not
21 raising it here. This is simply as to the final
22 instructions. Your position on the claim construction and
23 the underlying issue is well-documented in the record. So
24 that objection clearly is overruled.

25 You spoke a little bit quickly for me to follow

1 you. Give me, again, the first two matters you mentioned and
2 where they are.

3 MS. RAYMOND: Certainly, Your Honor. I apologize.

4 In the first paragraph, there is a statement at the
5 very end of that paragraph that says "as well as method
6 claims." Here, the method claims are no longer asserted in
7 the case, so we would propose deleting that language, "as
8 well as method claims."

9 THE COURT: All right. And then in the next
10 paragraph you suggested what deletion?

11 MS. RAYMOND: In the next paragraph, we suggest the
12 deletion of "or steps," which is in the second line of that
13 paragraph.

14 THE COURT: All right. Those objections are
15 granted, and I will make those changes.

16 MS. RAYMOND: Thank you, Your Honor.

17 THE COURT: Anything else from either party on Page
18 7?

19 MR. SUMMERS: No, Your Honor.

20 THE COURT: Turning next to Page 8 of the final
21 jury instructions, is there objection from either party?

22 MS. RAYMOND: Yes, Your Honor.

23 On the fourth paragraph, about two-thirds of the
24 way down the page, there is another reference to "or method."

25 It says: A product or method that meets all of the

1 requirements. And we would propose deletion of "or method."

2 THE COURT: That's in the last sentence of the
3 fourth paragraph?

4 MS. RAYMOND: That's correct, Your Honor.

5 THE COURT: Okay. I'll grant that objection, and
6 delete that "or method" language.

7 Also, Counsel, in the very first line of Page 7,
8 beginning the last two words of that line it says: Ordinary
9 and accustom meaning. I intend to say plain or ordinary
10 meaning -- "plain and ordinary meaning," instead of "ordinary
11 and accustom." If you have any problem with that, tell me
12 now.

13 MR. SUMMERS: No, Your Honor.

14 MS. RAYMOND: No, Your Honor.

15 THE COURT: Then is there -- if there's not
16 anything on page -- anything further on Page 8, we'll move to
17 Page 9 of the jury instructions, and I'll ask if either party
18 has an objection to offer there?

19 MR. SUMMERS: No objection from the Plaintiff.

20 MS. RAYMOND: No objection from the Defendant, Your
21 Honor.

22 THE COURT: All right. Next is Page 10. Is there
23 objection there?

24 MS. RAYMOND: Yes, Your Honor.

25 We have an objection here due to the omission of an

1 instruction. We discussed last night an issue regarding the
2 data supplier in the claims, and we believe that there should
3 be an instruction relating to the antecedent basis issue and
4 the data supplier being the same data supplier as a data
5 supplier in the relevant claims.

6 THE COURT: All right. That objection is
7 overruled.

8 Is there other objection from either party on Page
9 10?

10 MR. SUMMERS: I don't believe so, Your Honor.

11 THE COURT: Nothing else from Defendant on Page 10?

12 MS. RAYMOND: No, Your Honor.

13 THE COURT: Then let's turn to Page 11. Does
14 either party care to offer an objection to anything on Page
15 11?

16 MR. SUMMERS: Nothing from the Plaintiffs, Your
17 Honor.

18 MS. RAYMOND: Yes, Your Honor. We have two
19 objections on -- on this page.

20 One is the omission of the instruction: Evidence
21 of a good-faith belief of either non-infringement or
22 invalidity of a patent can be evidence that Apple lacks the
23 required intent for induced infringement.

24 THE COURT: And what's your second objection?

25 MS. RAYMOND: Our second objection is the inclusion

1 of the willfulness instruction simply because we believe that
2 because the subjective prong is not met, the objective
3 prong -- excuse me, because the objective prong is not met,
4 the subjective prong should not go to the jury.

5 THE COURT: All right. Those objections are
6 overruled.

7 We'll turn next to Page 12. Is there objection
8 from either party as to any matter on Page 12 of the final
9 jury instructions?

10 MS. RAYMOND: Yes, Your Honor. We have -- we have
11 an objection here, as well. I apologize. And that's the
12 omission of an i4i instruction. Apple had proposed the
13 language: Prior art differing from the prior art considered
14 by the Patent Office may carry more weight in meeting the
15 clear and convincing standard than the prior art that was
16 previously considered by the Patent Office.

17 THE COURT: All right. Anything else from the
18 Defendant on Page 12?

19 MS. RAYMOND: Your Honor, we just have a question,
20 and that is if this i4i instruction is omitted, may we,
21 nevertheless, in closing use the language from the i4i case?

22 THE COURT: Well, that's outside of this formal
23 jury -- excuse me, formal charge conference because we're
24 only focusing on the jury instructions and the verdict form.
25 I'll be glad to take that up outside of this after we finish

1 the formal charge conference.

2 MS. RAYMOND: Thank you, Your Honor.

3 MR. SUMMERS: Your Honor, may I briefly address the
4 i4i issue, extremely briefly?

5 THE COURT: All right. Very briefly.

6 MR. SUMMERS: Your Honor, we would say that we are
7 not in opposition to an instruction culled from i4i. We
8 believe that it may be necessary that that instruction be
9 given, and we would ask that our proposal, as it relates to
10 new prior art, be put into the instructions, as opposed to
11 Apple's proposal.

12 THE COURT: All right. Well, as I advised both
13 sides in the informal charge conference, there would be some
14 issues where I sided with the Plaintiff and some issues where
15 I sided with the Defendant, and there will be some issues to
16 where language you saw in the final version is the Court's
17 and it came from neither side and probably both of you would
18 object to it. And that's what we have here.

19 And your objections are overruled.

20 All right. We'll move to Page 13 of the final jury
21 instructions. Any objections from either party here?

22 MS. RAYMOND: Your Honor, just an issue here in the
23 second paragraph, the second line. There's a reference to
24 "or method," and we would propose that language be deleted.

25 THE COURT: All right. I'll grant that objection

1 and delete those words. Anything else --

2 MS. RAYMOND: Sorry, Your Honor. Secondly, in the
3 middle of the page at the bottom -- the end of the second
4 paragraph and then the third paragraph, there's a sentence
5 that's repeated, and so we would propose deleting the --
6 either the first or the second appearance of the sentence
7 that starts with: Apple must prove by clear and convincing
8 evidence that an asserted patent claim was anticipated by the
9 prior art reference.

10 THE COURT: All right. I'll grant that objection,
11 and the second sentence, which for some reason is set apart
12 as its own paragraph, will be deleted.

13 MS. RAYMOND: Thank you, Your Honor.

14 THE COURT: Anything else on Page 13?

15 MR. SUMMERS: Your Honor, just on the top of the
16 first sentence, the sentence is missing the word "and" Claims
17 13 in the '720 patent "and" 32 of the '221 patent.

18 THE COURT: All right. I'll insert the word "and"
19 after "patent" and before the number "32" on the top line of
20 Page 13.

21 Anything else?

22 MR. SUMMERS: Nothing from the Plaintiff, Your
23 Honor.

24 MS. RAYMOND: No, Your Honor.

25 THE COURT: Okay. We'll move next to Page 14. Any

1 objection from either party on anything on Page 14?

2 MS. RAYMOND: No, Your Honor.

3 MR. SUMMERS: No, Your Honor.

4 THE COURT: Next is Page 15. Are there objections
5 from either party here?

6 MR. SUMMERS: Your Honor, Plaintiff would object to
7 the instruction as to specifically calling out whether --
8 specifically instructing that there's no allegation that
9 Apple copied the patented technology as it relates to
10 secondary considerations.

11 Alternatively, we would propose that the Court's
12 instruction instruct that there's no contention in this case
13 that Apple actually copied the patented technology.

14 THE COURT: Can you give me a specific location of
15 the language you're talking about because quite honestly, I
16 thought we had covered that?

17 MR. SUMMERS: It's the bottom of Page 15, No. 4.

18 THE COURT: All right.

19 MR. SUMMERS: Very last sentence.

20 THE COURT: All right. I understand. There were
21 two issues involving copying we talked about yesterday.

22 MR. SUMMERS: Yes, Your Honor.

23 THE COURT: All right. I understand your
24 objection, and it's overruled.

25 Anything else from either party on Page 15?

1 MS. RAYMOND: No, Your Honor. We simply note the
2 agreement from Smartflash in this case that Smartflash is not
3 going to allege copying.

4 THE COURT: Well, I'm going to tell the jury that
5 there's no contention that Apple copied, so --

6 MS. RAYMOND: Thank you, Your Honor.

7 THE COURT: -- if they want to argue contrary to my
8 direct instructions, I think that's a pretty foolish course
9 to take, and I don't expect it will happen.

10 Again, I'm not going to address the final jury
11 argument issues within the final charge conference.

12 Turning to Page 16, anything in the matter -- in
13 the manner of an objection from either party on Page 16?

14 MR. SUMMERS: Nothing from the Plaintiffs, Your
15 Honor.

16 MS. RAYMOND: Nothing from Defendant, Your Honor.

17 THE COURT: Okay. Turning next to Page 17, does
18 either party wish to offer an objection to anything on Page
19 17?

20 MR. SUMMERS: Nothing from the Plaintiff, Your
21 Honor.

22 MS. RAYMOND: No objection from Defendant.

23 THE COURT: All right. Next is Page 18. Any
24 objection?

25 MR. SUMMERS: Nothing from the Plaintiff.

1 MS. RAYMOND: Yes, Your Honor. In the middle of
2 that page where it says in the fourth full paragraph, the
3 statement: Smartflash is entitled to recover no less than a
4 reasonable royalty. We would propose that "no less than" be
5 stricken because Smartflash here is seeking a reasonable
6 royalty, not lost profits.

7 And, in addition, Your Honor, I would just note
8 that the lump sum -- the definition of lump sum has been
9 omitted from these instructions. And because one of the
10 parties -- Apple here, their expert proposed a lump-sum
11 damages award, if there is one, we believe that there should
12 be a lump-sum instruction included.

13 THE COURT: Okay. So your first matter is you want
14 to remove "no less than"?

15 MS. RAYMOND: Correct, Your Honor. And the second
16 would be an addition of an instruction regarding lump sum.

17 THE COURT: All right. Well, I'll grant your first
18 objection and delete the words "no less than" from the second
19 line of what appears to be the fourth paragraph on Page 18.

20 With regard to your second objection, it's
21 overruled.

22 Anything else on Page 18?

23 MS. RAYMOND: No, Your Honor.

24 MR. SUMMERS: Your Honor, we would object to the
25 omission of the "no less than" language because it comes out

1 of -- straight out of U.S.C., Section 284.

2 THE COURT: Counsel, if you were going to object to
3 what she offered, it would have been nice to have heard about
4 it before I responded to it.

5 So you oppose what Defendant asked for in the
6 fourth paragraph of Page 18, correct?

7 MR. SUMMERS: Yes, Your Honor.

8 THE COURT: Well, hearing nothing from the
9 Plaintiff, I granted the Defendant's objection because I
10 assumed it was unopposed.

11 Finding that it is now opposed, I do agree that the
12 language is not harmful and more accurately reflects the law.

13 So had it been opposed, I would have denied it.

14 Finding that it is now opposed, I will deny
15 Defendant's objection and set aside my prior grant of it,
16 which at the time I thought was unopposed because I heard
17 nothing from the Plaintiff.

18 So the three words "no less than" in the middle
19 line of Paragraph 4 of Page 18 will be returned.

20 MR. SUMMERS: Thank you, Your Honor.

21 THE COURT: And if either of you offer something
22 that the other wants to object to -- in other words, if you
23 oppose a change offered by the other one, make sure I know
24 about it.

25 MR. SUMMERS: Yes, Your Honor.

1 THE COURT: Okay. Then we will -- unless I hear
2 anything else, turn to Page 19, and I'll ask if there are
3 objections on Page 19 of the final instructions.

4 MS. RAYMOND: Yes, Your Honor.

5 The objection relates to the table that's in the --
6 on this page, as well as the word "hypothetical negotiation"
7 with "S" in parentheses above it. Here, I believe that both
8 sides, both parties are in agreement that there would be one
9 hypothetical negotiation.

10 We would propose in that table, with respect to the
11 statement "for infringement of the '720 patent," to add some
12 language, such as "alone" or "in addition to infringement of
13 the '221 or '772 patents."

14 Similarly, with respect to the second row of that
15 table, referring to the '221 patent, we would propose an
16 addition along the lines of "alone" or "in addition to the
17 '772 patent."

18 And then with respect to the third row, we would
19 propose a parenthetical after '772 patent, "but no others."

20 And, Your Honor, what this would achieve would be
21 the jury would understand that there's one hypothetical
22 negotiation which starts just before infringement of the
23 first infringed patent, if infringement is indeed found.

24 MR. SUMMERS: Your Honor, we believe that the
25 Court's current instructions are clear enough on that score,

1 and we would oppose that proposal.

2 THE COURT: Well, we talked about this in the
3 informal charge conference, and the identification of the
4 various hypothetical negotiation dates relating to the three
5 patents-in-suit was suggested by the Defendant over the
6 objections last night of the Plaintiff, and now I find the
7 Defendant doesn't like the way I accepted their suggestion
8 and put it forward in the instructions.

9 And if I read the submission from the Defendant
10 last night correctly from the prior joint submission, it
11 identified a commencement of infringement for each patent.

12 I'm going to overrule the Defendant's objection as
13 raised on Page 19.

14 Anything else before we turn to Page 20?

15 MS. RAYMOND: No, Your Honor.

16 MR. SUMMERS: Nothing from the Plaintiffs.

17 THE COURT: Then let's turn to Page 20.

18 Page 20 contains several of the 15 Georgia-Pacific
19 factors. We also discussed last night that both sides
20 requested the Court charge the jury on all 15 of the factors
21 and agreed that doing so would not be error, even if one or
22 more of the factors themselves had not been particularly
23 raised or addressed in the evidence or the testimony.

24 Do you both still maintain that position?

25 MR. SUMMERS: Plaintiffs still maintain that

1 position, yes, Your Honor.

2 MS. RAYMOND: Yes, Your Honor.

3 THE COURT: Okay. Are there specific objections on
4 Page 20?

5 MR. SUMMERS: Nothing from the Plaintiffs, Your
6 Honor.

7 MS. RAYMOND: No, Your Honor. Nothing from
8 Defendant.

9 THE COURT: Okay. Then let's turn to Page 21.
10 Are there objections there?

11 MR. SUMMERS: Your Honor, just one objection from
12 the Plaintiffs.

13 In the entire market value rule instruction at the
14 bottom of Page 21, the second line of that last paragraph,
15 Your Honor uses the phrase "patented invention." In the
16 prior paragraph, the discussion is "patented features or
17 components."

18 And Smartflash would object to changing the thing
19 Your Honor is discussing in the instructions between the
20 apportionment section and the entire market value rule
21 section.

22 MS. RAYMOND: And, Your Honor, with respect to
23 Apple, we believe that the patented invention language is the
24 correct language and that the second to the last paragraph
25 that refers to patented features should be -- should use the

1 language "patented invention."

2 THE COURT: All right. Well, both objections are
3 overruled.

4 Anything else on Page 21?

5 MR. SUMMERS: Nothing further, Your Honor.

6 MS. RAYMOND: No, Your Honor.

7 THE COURT: Turning then to Page 22, are there
8 objections there, Counsel?

9 MS. RAYMOND: Yes, Your Honor.

10 With respect to the last sentence, which starts
11 with "however": However, if you find that consumer demand
12 for the product --

13 THE COURT: The last sentence before "the attorneys
14 on closing argument"?

15 MS. RAYMOND: Correct, Your Honor.

16 THE COURT: Okay.

17 MS. RAYMOND: And that sentence refers to:

18 Consumer demand for the product is not based on the patented
19 invention.

20 And there, it's our position that the word "solely"
21 would need to be added between "based" -- between "based" and
22 "on the patented invention" to make it correct and consistent
23 with Federal Circuit law and damages.

24 MR. SUMMERS: Your Honor, we would oppose that
25 proposal because that is addressed in the alone motivated

1 language.

2 MS. RAYMOND: And, Your Honor, our position is that
3 the alone motivated language needs to be explained and that
4 this last sentence here that we've been looking at that
5 starts with "however" is not an appropriate description of
6 the -- of what the alone motivated means.

7 THE COURT: Okay. So to make sure I understand,
8 Defendant is proposing that on the second line of Page 22
9 between the last two words "not" and "based," that the word
10 "solely" be inserted; is that correct?

11 MS. RAYMOND: I believe it would be "is not solely
12 based on" -- or "based solely on," I believe would, in fact,
13 be more correct, Your Honor.

14 THE COURT: So you don't want me to just say it
15 once; you want me to say it twice; is that right? Or is
16 there a difference in what you're proposing?

17 MS. RAYMOND: Your Honor, we're simply proposing
18 that the sentence that we've been looking at with the
19 language "based on" reflects "based solely on" because we
20 believe that the phrase "alone motivated" needs to be defined
21 and is not defined properly by this sentence that we've been
22 looking at.

23 THE COURT: Well, let's do it this way, Counsel:
24 The sentence that begins "however, if you find," what we're
25 talking about, read that sentence to me as you would propose

1 on behalf of the Defendant that it should be submitted to the
2 jury.

3 MS. RAYMOND: However, if you find that consumer
4 demand for the product is not based solely on the patented
5 invention, you should award damages based on the value of the
6 patented invention and not the entire value of the accused
7 products.

8 THE COURT: All right.

9 MR. SUMMERS: Your Honor, we would oppose that
10 proposal.

11 THE COURT: All right. Give me just a minute.

12 (Pause in proceedings.)

13 THE COURT: All right. I'm going to grant that
14 objection by the Defendant, and I'll add the word "solely"
15 after the word "based," "not based solely on the patented
16 invention."

17 MS. RAYMOND: Thank you, Your Honor.

18 THE COURT: Anything else on Page 22?

19 MS. RAYMOND: Nothing else, Your Honor, from
20 Defendant.

21 THE COURT: Anything else from the Plaintiff?

22 MR. SUMMERS: Nothing else from Plaintiff, Your
23 Honor.

24 THE COURT: All right. Page 23, any objection from
25 either party?

1 MS. RAYMOND: No objections, Your Honor.

2 MR. SUMMERS: Nothing from the Plaintiff, Your
3 Honor.

4 THE COURT: Page 24?

5 MS. RAYMOND: No objections, Your Honor.

6 MR. SUMMERS: Nothing from the Plaintiff.

7 THE COURT: All right. That's the last page of the
8 final jury instructions.

9 We'll turn next to the proposed verdict form. The
10 first page is a cover page identifying the parties and the
11 style and the cause number.

12 Any objection on Page 1?

13 MR. SUMMERS: Nothing from the Plaintiff.

14 MS. RAYMOND: No, Your Honor.

15 THE COURT: Turning to Page 2 of the verdict form,
16 which covers Question 1, is there objection from either
17 party?

18 MR. SUMMERS: Nothing from the Plaintiff.

19 MS. RAYMOND: No, Your Honor.

20 THE COURT: Turning to Page 3, which covers
21 Question 2 of the verdict form, is there objection from
22 either party?

23 MR. SUMMERS: Nothing from the Plaintiff.

24 MS. RAYMOND: Your Honor, we have an objection only
25 to the extent that willfulness is included and sent to the

1 jury.

2 THE COURT: I understand your substantive
3 objection; but not waiving what you've previously objected to
4 with regard to willfulness, you don't have any objection to
5 the form of the question?

6 MS. RAYMOND: No, Your Honor.

7 THE COURT: Then we'll turn to Page 4 of the
8 verdict form, which contains Question 3. Is there objection
9 there?

10 MR. SUMMERS: Nothing from the Plaintiff.

11 MS. RAYMOND: Nothing from the Defendant, Your
12 Honor.

13 THE COURT: Turning next to Page 5, which is the
14 last page of the verdict form, which contains Question 4 on
15 the verdict, is there an objection?

16 MR. SUMMERS: Yes, Your Honor.

17 Plaintiff would object to the extent that the
18 question does not make clear that the compensation is only
19 for the infringement of Smartflash's patents up until the
20 time of trial.

21 THE COURT: All right. What's Defendant's
22 position?

23 MS. RAYMOND: Your Honor, Defendants believe that
24 there should be a question that goes to whether the award is
25 a lump sum or whether it's a running royalty.

1 THE COURT: All right. Well, I considered both
2 submissions. I believe what's here is proper, and I'll
3 overrule both objections.

4 That's the last page of the verdict form. That
5 completes the formal charge conference.

6 Now, before the Court recesses to make these
7 changes and generate the final copies necessary, before we
8 begin final jury instructions, are there questions to be
9 raised with regard to final jury argument? Do counsel wish
10 any clarification from the Court?

11 MR. CALDWELL: None from the Plaintiff.

12 MR. WARD: One -- one clarification, Your Honor.

13 It sounded like the Defendants are going to argue
14 that art that was not before the Examiner is to be -- should
15 be not subjected to the same burden that art that was before
16 the Examiner when the patents were issued.

17 And I just want clarification from the Court as to
18 whether or not they'd be permitted to do that. We think it's
19 improper. There's all kinds of issues going on with covered
20 business method reviews, and we think it would be improper to
21 suggest that the Patent Office has not considered the art
22 that is before this jury; and that there be some different
23 burden to be applied for the jury.

24 THE COURT: All right. Defendants clarify for me
25 what you particularly intend to do in this regard.

1 MR. BATCHELDER: Good morning, Your Honor.

2 May it please the Court.

3 We believe under the i4i case, that it is proper
4 for the jury to consider whether when these patents were
5 granted, the art that we cited was before the Patent Office,
6 and here there's no evidence that the art -- that we relied
7 on it, any of it, was before the Patent Office when these
8 patents were granted.

9 And so I know Your Honor's overruled our request
10 for an instruction on that, but we think it makes sense, in
11 light of that, for Defendants to be able to read the language
12 from the Supreme Court decision to the jury to convey that
13 principle to them for their deliberations.

14 THE COURT: All right. Well, the Court considered
15 that request that was raised in the informal charge
16 conference yesterday. The Court intentionally deleted that
17 suggested included instruction.

18 The language that Defendants seek to include is
19 based clearly upon dicta from a Supreme Court opinion that
20 says the Court may choose to charge the jury.

21 The Court's elected not to. The Court is not bound
22 by dicta, and the Court intentionally did not include the
23 suggested instruction from the Defendants, and I think it
24 would be improper for you to argue contrary to my
25 instructions, and I think it would be highly improper for

1 either party to argue anything about what the law is except
2 to quote to the jury what the Court has instructed them on
3 what the law is.

4 So I would -- I would consider that type of
5 argument, Mr. Batchelder, to be improper jury argument, and
6 I'm instructing you not to present that argument in light of
7 this discussion.

8 MR. BATCHELDER: Understood, Your Honor. Thank
9 you.

10 May I, in closing, point out to the jury that there
11 is no evidence that any of this art was before the Patent
12 Office when the patents were issued and not comment on weight
13 to be assigned to that fact?

14 THE COURT: You know, as to factual contentions,
15 that's what closing argument is about, but you're not to
16 attempt to advise the jury directly or indirectly that you
17 have a differing opinion about the instructions from the
18 Court on what the law is.

19 MR. BATCHELDER: Thank you.

20 And Apple has one remaining question about the
21 closings, Your Honor, and it comes back to the point about
22 copying. And I understand Your Honor's ruling, and we have
23 an objection on that point.

24 What I want to make sure of, though, is that we
25 don't hear from Plaintiffs in closing that Mr. Farrugia

1 showed up at Apple; and as a result of him having been
2 exposed to the patents or whatever, he was able to much more
3 quickly at Apple create this system, because that -- that
4 argument is copying without using that word.

5 THE COURT: Well, I think that falls squarely
6 within the purview of jury argument. I don't agree that
7 that's copying without using that word. You certainly are
8 entitled to reference my instruction that there's no
9 contention of copying by Apple in the case.

10 I'm not going to -- I'm not going to micromanage
11 what the lawyers can argue to the jury, as long as those
12 arguments are based on the disputed facts in the case.

13 The law in the case is not in dispute, and it's as
14 given to the jury by the Court, and I won't sanction
15 differing arguments from counsel as to what the Court's
16 instruction on the law is.

17 MR. BATCHELDER: I understand, Your Honor. Thank
18 you.

19 THE COURT: Okay. Are there any other questions we
20 need to get out of the way? Because I expect the closings to
21 go off clearly, without interruption or without problems. So
22 if anybody has a question in their mind about it, now's the
23 time to raise it.

24 I assume by your silence that there's not anything
25 else with regard to the manner of closings that needs to be

1 disclosed.

2 MR. BATCHELDER: Nothing further from Apple, Your
3 Honor.

4 MR. WARD: Nothing further from the Plaintiff.

5 MR. CALDWELL: I believe -- do we have a minute or
6 two to work on the slides pursuant to how you --

7 THE COURT: I expect the Court's going to need
8 somewhere around 20 minutes to do mechanically what I need to
9 do, and I expect between 10:20 and 10:30 to come back in and
10 bring the jury in and proceed with the final jury
11 instructions.

12 MR. CALDWELL: All right. Thank you, Your Honor.

13 THE COURT: So you're free to use that intervening
14 time in any way you need to.

15 MR. CALDWELL: Thank you.

16 THE COURT: All right. The Court stands in recess.

17 COURT SECURITY OFFICER: All rise.

18 (Recess.)

19 (Jury out.)

20 COURT SECURITY OFFICER: All rise.

21 THE COURT: Be seated, please.

22 All right. Ms. Mayes, please bring in the jury.

23 COURT SECURITY OFFICER: All rise for the jury.

24 (Jury in.)

25 THE COURT: Good morning, Ladies and Gentlemen.

1 Please be seated.

2 Ladies and Gentlemen of the Jury: You've now heard
3 the evidence in this case. I will now instruct you on the
4 law that you must apply.

5 Each of you will have a copy of these final jury
6 instructions for your review when you retire to deliberate in
7 a few moments.

8 Accordingly, there's no need for you to take
9 written notes on these written instructions unless you
10 particularly want to do so.

11 It's your duty to follow the -- the law as I give
12 it to you. On the other hand, as I've said previously, you,
13 the jury, are the sole judges of the facts.

14 Do not consider any statement that I have made in
15 the course of the trial or may make in these instructions as
16 an indication that I have any opinion about the facts of the
17 case.

18 You're about to hear closing arguments from the
19 attorneys. Statements and arguments of the attorneys are not
20 evidence and are not instructions on the law. They're
21 intended only to assist the jury in understanding the
22 evidence and the parties' contentions.

23 A verdict form has been prepared for you. You'll
24 take this to the jury room; and when you've reached unanimous
25 agreement as to your verdict, you will have your foreperson

1 fill in the blanks in that form, date it, and sign it.

2 Answer each question in the verdict form from the
3 facts as you find them to be. Do not decide who you think
4 should win and then answer the questions accordingly.

5 Your answers and your verdict in this case must be
6 unanimous.

7 The parties have stipulated or agreed to some facts
8 in this case. When the lawyers on both sides stipulate to
9 the existence of a fact, you must, unless otherwise
10 instructed, accept the stipulation as evidence and regard the
11 fact as proved.

12 In determining whether any fact has been proven in
13 this case, there are two types of evidence that you may
14 consider in properly finding the truth as to the facts in
15 this case.

16 One is direct evidence, such as the testimony of an
17 eyewitness. The other is indirect or circumstantial
18 evidence; that is, the proof of a chain of circumstances that
19 indicates the existence or non-existence of certain other
20 facts.

21 As a general rule, the law makes no distinction
22 between direct or circumstantial evidence but simply requires
23 that you find the facts based on the evidence presented, both
24 direct and circumstantial.

25 You may, unless otherwise instructed, consider the

1 testimony of all the witnesses, regardless of who may have
2 called them, and all the exhibits received and admitted into
3 evidence, regardless of who may have introduced them in
4 answering any question.

5 By allowing the testimony or other evidence to be
6 introduced over the objection of an attorney, the Court did
7 not indicate any opinion as to the weight or effect of such
8 evidence.

9 As I've stated before, you are the sole judges of
10 the credibility of all the witnesses and what weight and
11 effect to give to the evidence in this case.

12 When the Court sustained an objection to a question
13 addressed to a witness, you must disregard the question
14 entirely, and you may draw no inference from its wording or
15 speculate about what the witness would have said if he or she
16 had been permitted to answer the question.

17 Now, at times during the trial, it's been necessary
18 for the Court to talk with the attorneys here at the bench
19 outside of your hearing or by calling a recess and talking to
20 them while you were out of the courtroom. This happened
21 because, during a trial, things often arise that do not
22 involve the jury.

23 You should not speculate on what was said during
24 such discussions that took -- took place outside of your
25 presence.

1 Certain testimony in this case has been presented
2 to you through depositions. A deposition is the sworn,
3 recorded answers to questions asked to a witness in advance
4 of the trial.

5 If a witness cannot be present to testify in person
6 from the witness stand, then that witness's testimony may be
7 presented under oath in the form of a deposition.

8 Before the trial, the attorneys representing the
9 parties for both sides of the case questioned these
10 deposition witnesses under oath. A court reporter was
11 present, and their testimony was recorded.

12 Deposition testimony is entitled to the same
13 consideration as testimony given by a witness in person from
14 the witness stand in open court.

15 Accordingly, you should judge the credibility and
16 weigh the importance of deposition testimony to the best of
17 your ability just as if the witness had testified in person
18 in open court.

19 Ladies and Gentlemen, while you should consider
20 only the evidence in this case, you are permitted to draw
21 such reasonable inferences from the testimony and exhibits as
22 you feel are justified in the light of common experience.

23 In other words, Ladies and Gentlemen, you may make
24 deductions and reach conclusions that reason and common sense
25 lead you to draw from the facts that have been established by

1 the testimony and the evidence in the case.

2 Unless I instruct -- instruct you otherwise, the
3 testimony of a single witness may be sufficient to prove any
4 fact, even if a greater number of witnesses may have
5 testified to the contrary, if, after considering all of the
6 evidence, you believe that single witness.

7 When knowledge of a technical subject may be
8 helpful to the jury, a person who has special training or
9 experience in that technical field, called an expert witness,
10 is permitted to state his or her opinions on those technical
11 matters.

12 However, you're not required to accept that opinion
13 or those opinions. As with any other witness, it's solely up
14 to you to decide whether to rely upon that or not.

15 In any lawsuit, the facts must be proved by a
16 required amount of evidence known as the burden of proof.

17 The burden of proof in this case is on the
18 Plaintiff, Smartflash, for some issues and on the Defendant,
19 Apple, for other issues.

20 As I mentioned at the beginning of the trial, there
21 are two burdens of proof that you will apply in this case:
22 Preponderance of the evidence and clear and convincing
23 evidence.

24 The Plaintiff, Smartflash, has the burden of
25 proving infringement and damages by a preponderance of the

1 evidence.

2 A preponderance of the evidence means evidence that
3 persuades you that a claim is more probably true than not
4 true. More probably true than not true. Sometimes this is
5 talked about as being the greater weight and degree of
6 credible testimony.

7 Apple, the Defendant, has the burden of proving
8 invalidity by clear and convincing evidence. And Smartflash,
9 the Plaintiff, has the burden of proving willfulness by clear
10 and convincing evidence.

11 Clear and convincing evidence means evidence that
12 produces in your mind an abiding conviction that the truth of
13 the parties' factual contentions are highly probable. An
14 abiding conviction that the truth of the parties' factual
15 contentions are highly probable.

16 Although proof to an absolute certainty is not
17 required, the clear and convincing evidence standard requires
18 a greater degree of persuasion than is necessary for the
19 preponderance of the evidence standard.

20 If proof establishes in your mind an abiding
21 conviction in the truth of the matter, then the standard has
22 been met.

23 In determining whether any fact has been proved by
24 a preponderance of the evidence or by clear and convincing
25 evidence, you may, unless otherwise instructed, consider the

1 stipulations, the testimony of all the witnesses, regardless
2 of who called them, and all the exhibits received into
3 evidence, regardless of who may have produced them.

4 As I did at the start of the case, I will first
5 give you a summary of each side's contentions in this case.
6 I'll then provide you with detailed instructions on what each
7 side must prove to win on each of its contentions.

8 As I previously advised you, this case concerns
9 United States patents: Patent No. 7,334,720, referred to as
10 the '7-2-0 or '720 patent; Patent No. 8,118,221, referred to
11 as the '2-2-1 or '221 patent; and Patent 8,336,772, referred
12 to as the '7-7-2 patent or the '772 patent.

13 I will collectively refer to these three patents as
14 the patents-in-suit.

15 The Plaintiff, Smartflash, seeks money damages from
16 the Defendant, Apple, for allegedly infringing the
17 patents-in-suit by making, using, selling, or offering for
18 sale products that have technology that allows consumers to
19 purchase and use content.

20 Smartflash argues that such products are covered by
21 Claim 13 of the '720 patent and Claim 32 of the '221 patent
22 and Claims 26 and 32 of the '772 patent. These claims are
23 the asserted claims of the patents-in-suit.

24 Smartflash also contends that Apple's infringement
25 has been willful. Smartflash seeks damages in the form of a

1 reasonable royalty.

2 In response -- in response to Smartflash's
3 contentions, Apple contends that neither Apple nor its
4 customers have directly infringed the patents-in-suit.

5 Apple also contends that it has not induced the
6 direct infringement of the asserted claims. Apple also
7 contends that all of the asserted claims are invalid because
8 they are either anticipated or rendered obvious by the prior
9 art.

10 Apple also contends that Claim 26 of the '772
11 patent is invalid because of a lack of an adequate written
12 description.

13 Apple also contends that Smartflash is not entitled
14 to damages for any infringement.

15 Your job is to decide whether Apple has infringed
16 the asserted claims of the patents-in-suit and whether the
17 asserted claims of the patents-in-suit are invalid.

18 If you decide that any claim of the patents-in-suit
19 has been infringed and is not invalid, you will then need to
20 decide what amount of money damages, if any, are to be
21 awarded to Smartflash to compensate it for that infringement.

22 Before you can decide many of the issues in the
23 case, you'll need to understand the role of the patent
24 claims. Patent claims are the numbered sentence at the end
25 of the patent. Claims are important because it's the words

1 of the claims that define what a patent covers.

2 The figures and the text in the rest of the patent
3 provide a description and/or examples of the invention and
4 provide a context for the claims, but it is the claims that
5 define the breadth of the patent's coverage.

6 Each claim is effectively treated as if it were a
7 separate patent, and each claim may cover more or less than
8 any other claim. Therefore, what a patent covers
9 collectively depends on what each of its claims covers.

10 Claims may describe methods, apparatuses, products,
11 such as machines or chemical compounds or processes for
12 making or using a product.

13 In this case, Smartflash has asserted apparatus or
14 product claims.

15 Each patent claim sets forth in words a set of
16 requirements in a single sentence. The requirements of a
17 claim are usually divided into parts called "limitations" or
18 "elements."

19 If a device satisfies each of the requirements in
20 the claim's sentence, then it is said that device is
21 "covered" by the claim, "falls under" the claim, or
22 "infringes" the claim.

23 For example, a claim that covers the invention of a
24 table may recite the tabletop, four legs, and the glue that
25 secures the legs to the tabletop. In this example, the

1 tabletop, legs, and glue are each separate limitations of the
2 claim.

3 If a device is missing even -- even one limitation
4 or element of a claim, it does not meet all of the
5 requirements of a claim and is not covered by the claim. If
6 a device is not covered by the claim, it does not infringe
7 the claim.

8 You first need to understand each claim in order to
9 decide whether or not there is infringement of the claim and
10 to decide whether or not the claim is invalid.

11 The first step is to understand the meaning of the
12 words used in the patent claim. The law says that it is my
13 role as the Judge to define the terms of the claims, and it
14 is your role as the jury to apply my definitions to the
15 issues that you are asked to decide in this case.

16 Therefore, as I explained to you at the start of
17 the case, I have determined the meaning of certain claim
18 terms, and I have provided my definitions to you of those
19 certain claims terms, and these definitions are in your juror
20 notebooks.

21 You must accept my definitions of these words in
22 the claims as being correct. It's your job to take these
23 definitions that I have supplied, and apply them to the
24 issues that you are asked to decide, including both the
25 issues of infringement and invalidity.

1 For claims that I have not construed or defined,
2 you are to use the plain and ordinary meaning of the terms as
3 understood by one of ordinary skill in the art, which is to
4 say, in the field of technology of the patent at the time of
5 the invention.

6 This case involves two types of patent claims:
7 Independent and dependent claims.

8 An independent claim does not refer to any other
9 claim of the patent. An independent claim sets forth all the
10 requirements that must be met in order to be covered by that
11 claim. It is not necessary to look at any other claim to
12 determine what an independent claim covers.

13 In this case, for example, Claim 32 of the '221
14 patent is an independent claim.

15 The rest of the claims being asserted in this case
16 are dependent claims. A dependent claim does not itself
17 recite all of the requirements of the claim, but refers to
18 another claim for some of its requirements.

19 In this way, the claim depends on another claim.
20 The law considers a dependent claim to incorporate all of the
21 requirements of the claims to which it refers. The depend --
22 the -- the dependent claim then adds its own additional
23 requirements.

24 To determine what a dependent claim covers, it's
25 necessary to look at both the dependent claim and any other

1 claims to which it refers. A product that meets all of the
2 requirements of both the dependent claim and claims to which
3 it refers is covered by that dependent claim.

4 The beginning portion, or preamble, of a number of
5 Smartflash's asserted claims use the word "comprising." The
6 word "comprising," when used in the preamble, means including
7 but not limited to or containing but not limited to.

8 When "comprising" is used in the preamble, if you
9 decide that an accused product includes all of the
10 requirements of that claim, the claim is infringed. This is
11 true even if the accused instrumentality contains additional
12 elements.

13 For example, a claim to a table comprising a
14 tabletop, legs, and glue would be infringed by a table that
15 includes a tabletop, legs, and glue, even if the table also
16 includes wheels on the end of the table's legs.

17 A patent owner has the right to stop others using
18 the invention covered by its patent claims in the United
19 States during the life of the patent.

20 If a person makes, uses, sells, or offers to sell
21 within the -- within the United States or imports into the
22 United States what is covered by the patent claims without
23 the patent owner's permission, that person is said to
24 infringe the patent.

25 In reaching your decision on infringement, keep in

1 mind that only the claims of a patent can be infringed. You
2 must compare the asserted patent claims, as I have defined
3 each of them, to the accused products and determine whether
4 or not there is infringement.

5 You should not compare the accused products with
6 any specific example set out in the patent or with the
7 patentholder's commercial products or with the prior art.

8 The only correct comparison is between the language
9 of the claim itself and the accused products, just as I've
10 explained to you.

11 You must reach your decision as to each assertion
12 of infringement based on my instructions about the meaning
13 and scope of the claims, the legal requirements for
14 infringement, and the evidence presented to you by both of
15 the parties.

16 Also, the issue of infringement is assessed on a
17 claim-by-claim basis. Therefore, there may be infringement
18 as to one claim but no infringement as to another claim in a
19 patent.

20 In this case, there are two possible ways that a
21 claim may be infringed. I'll explain the requirements for
22 each of these types of infringement to you. The two types of
23 infringement are called direct infringement and indirect
24 infringement.

25 In order to prove direct infringement of a patent

1 claim, Smartflash must show by a preponderance of the
2 evidence that the accused product includes each and every
3 requirement of that claim.

4 In determining whether an accused product directly
5 infringes a patent claim in this case, you must compare the
6 accused product with each and every one of the requirements
7 of that claim to determine whether the accused product
8 contains each and every requirement recited in the claim.

9 A claim requirement is present if it exists in an
10 accused product just as it is described in the claim
11 language, either as I have explained the language to you; or
12 if I did not explain it, as it would be understood by one of
13 ordinary skill in the art.

14 If an accused product omits any product recited in
15 a claim, then you must find that that particular product does
16 not literally infringe that claim.

17 A patent can be directly infringed even if the
18 alleged infringer did not have knowledge of the patent and
19 without the infringer knowing that what it was doing was
20 infringement of the claim.

21 A patent may also be directly infringed even though
22 the accused infringer believes in good faith that what it is
23 doing is not infringement of the patent. Infringement does
24 not require proof that a party copied the asserted patent
25 claims.

1 In addition to alleging direct infringement of the
2 asserted patent claims, Plaintiff, Smartflash, alleges that
3 Defendant, Apple, induces infringement of its asserted patent
4 claims. The act of encouraging or inducing others to
5 infringe a patent is called inducing infringement.

6 Smartflash alleges that Apple is liable for
7 infringement by actively inducing another party or parties to
8 directly infringe its patents.

9 As with direct infringement, you must determine
10 inducement -- excuse me -- you must determine whether there
11 has been active inducement on a claim-by-claim basis.

12 Apple is liable for active inducement of a claim if
13 Smartflash proves by a preponderance of the evidence that:

14 (1) the acts are actually carried out by Apple's
15 customers using the accused products and directly infringe
16 that claim;

17 (2) Apple took action during the time the patent
18 was in force intending to cause the infringing acts by
19 Apple's customers using the accused products;

20 And (3) Apple was aware of or willfully blind to
21 the patent and knew that the acts, if taken, would constitute
22 infringement of the patent or that Apple was willfully blind
23 to that infringement.

24 To prove willful blindness, Smartflash must prove
25 by a preponderance of the evidence that there was a high

1 probability that a fact exists and that Apple took deliberate
2 acts to avoid learning of that fact.

3 In order to establish active inducement of
4 infringement, it's not sufficient that the other party or
5 parties themselves directly infringe the claim, nor is it
6 sufficient that Apple was aware of the acts by its customers
7 using the accused products that allegedly constitute the
8 direct infringement.

9 Rather, you must find that Apple specifically
10 intended its customers using the accused products to infringe
11 the patent or that Apple believed there was a high
12 probability that its customers would infringe the patent but
13 deliberately avoided learning the infringing nature of its
14 customers' acts.

15 In this case, Ladies and Gentlemen, Smartflash
16 contends that Apple has willfully infringed its patents. If
17 you've decided that Apple has infringed, you must address the
18 additional issue of whether or not that infringement was
19 willful.

20 Willfulness requires you to determine, by clear and
21 convincing evidence, that Apple acted recklessly.

22 To prove that Apple acted recklessly, Smartflash
23 must prove by clear and convincing evidence that Apple
24 actually knew or should have known that its actions
25 constituted an unjustifiably high risk of infringement of a

1 valid patent.

2 To determine whether -- to determine whether Apple
3 had this state of mind, consider all facts, which may include
4 but are not limited to:

5 (1) Whether or not Apple acted in accordance with
6 the standards of commerce for its industry;

7 (2) Whether or not there is a reasonable basis for
8 Apple to have believed that it did not infringe or had a
9 reasonable defense to infringement;

10 (3) Whether or not Apple made a good-faith effort
11 to avoid infringing the asserted claims of the asserted
12 patents, for example, whether Apple attempted to design around
13 the asserted Smartflash patents;

14 And (4) whether or not Apple tried to cover up its
15 infringement.

16 None of these factors alone is determinative, and
17 this list of factors is not an exhaustive list of things that
18 you should consider.

19 Your determination of willfulness should
20 incorporate the totality of the circumstances based on the
21 evidence presented during this trial.

22 Again, Smartflash has the burden of proving
23 willfulness by clear and convincing evidence.

24 I'll now instruct you on the rules that you must
25 follow in deciding whether or not Apple has proven the

1 asserted claims of the patents-in-suit are invalid.

2 An issued patent is accorded a presumption of
3 validity based on the presumption that the United States
4 Patent and Trademark Office, which you've often heard
5 referred to simply as the PTO, acted correctly in issuing the
6 patent.

7 This presumption of validity extends to all issued
8 patents, including those that claim the benefit of an earlier
9 filed patent application -- application, such as so-called
10 "continuations" or "continuations-in-part."

11 To prove that any claim of a patent is invalid,
12 Apple must persuade you by clear and convincing evidence that
13 the claim is invalid.

14 Like infringement, validity is determined on a
15 claim-by-claim basis. You must determine separately for each
16 claim whether that claim is invalid.

17 If one claim of a patent is invalid, this does not
18 mean that any other claim is necessarily invalid. Claims are
19 construed the same way for determining infringement as for
20 determining invalidity.

21 Apple has challenged the validity of the asserted
22 claims on a number of grounds. In making your determination
23 as to invalidity, you should -- you should consider each
24 claim separately.

25 Apple contends that Claims 13 of the '720 patent

1 and Claim 32 of the '221 patent are invalid for being
2 anticipated by prior art. Apple bears the burden of
3 establishing anticipation by clear and convincing evidence.

4 A patent claim is invalid if the claimed invention
5 is not new. For a claim to be invalid because it is not new,
6 all of its requirements must have existed in a single device
7 that predates the claimed inventions or must have been
8 described in a single, previous publication or patent that
9 predates the claimed invention.

10 In patent law, a previous device, publication, or
11 patent that predated the claimed invention is called a prior
12 art reference.

13 If a patent claim is not new, we say that it is
14 anticipated by the prior art or by a prior art reference.

15 Anticipation requires that a single reference, not
16 only disclose all elements of the claim within the four
17 corners of the document, but that it must also disclose those
18 elements arranged or combined in the same way as in the
19 claim.

20 Apple must prove with clear and convincing evidence
21 that an asserted patent claim was anticipated by the prior
22 art reference.

23 In determining whether or not -- whether or not the
24 invention is valid, you must determine the scope and content
25 of the prior art at the time the invention was made.

1 For prior art to anticipate a claim of a patent,
2 the disclosure in the prior art reference does not have to be
3 in the same words as in the claim, but all of the elements of
4 the claim must be there, either stated or necessarily
5 implied, so that someone of ordinary skill in the field of
6 the invention, looking at that one prior art reference, would
7 be able to make and use at least one embodiment of the
8 claimed invention.

9 Anticipation can occur when the claimed invention
10 inherently, and necessarily results from practice of what is
11 disclosed in the written reference, even if the inherent
12 disclosure was unrecognized or unappreciated by one of
13 ordinary skill in the field of the invention.

14 If you find that a patent claim is not new, that is
15 anticipated, as explained above, you should find that claim
16 invalid.

17 Apple contends that the asserted claims of the
18 patent-in -- patents-in-suit are invalid as obvious. Even
19 though an invention may not have been identically disclosed
20 or described in a single prior art reference before it was
21 made by an inventor, the invention may have been obvious to a
22 person of ordinary skill in the field of technology of the
23 patent at the time the invention was made.

24 Apple bears the burden of establishing obviousness
25 by clear and convincing evidence.

1 In determining whether a claimed invention is
2 obvious, you, the jury, must consider the level of ordinary
3 skill in the field of technology of the patent that someone
4 would have had at the time the claimed invention was made,
5 the -- the scope and content of the prior art, any
6 differences between the prior art and the claimed invention,
7 as well as the ordinary knowledge of the person of ordinary
8 skill at the time of the invention.

9 The skill of the actual inventor is irrelevant
10 because inventors may possess something that distinguishes
11 them from workers of ordinary skill in the art.

12 Keep in mind that the existence of each and every
13 element of the claimed invention in the prior art does not
14 necessarily prove obviousness. Most, if not all inventions,
15 rely on building blocks of prior art.

16 In considering whether a claimed invention is
17 obvious, you should consider whether, as of the priority date
18 of the patents-in-suit, there was a reason that would have
19 prompted a person of ordinary skill in the field to combine
20 the known elements in a way that the claimed invention does,
21 taking into account such facts as:

22 (1) Whether the claimed invention was merely the
23 predictable result of using prior art elements according to
24 their known function;

25 (2) Whether the claimed invention provides an

1 obvious solution to a known problem in the relevant field;

2 (3) Whether the prior art teaches or suggests the
3 desirability of combining elements in the claimed inventions;

4 (4) Whether the prior art teaches away from
5 combining elements in the claimed invention;

6 (5) Whether it would have been obvious to try the
7 combination of elements, such as when there is a design need
8 or market pressure to solve a problem, and there are a finite
9 number of identified, predictable solutions;

10 And (6) whether the change resulted more from
11 design incentives or other market forces.

12 To find that prior art rendered the invention
13 obvious, you must find that the prior art provided a
14 reasonable expectation of success.

15 In determining whether the claimed invention was
16 obvious, consider each claim separately. Consider only what
17 was known at the time of the invention.

18 In making these assessments, Ladies and Gentlemen,
19 you should take into account any objective evidence
20 (sometimes called "secondary considerations") that may have
21 existed at the time of the invention, and afterwards, may
22 shed light on non-obviousness, such as:

23 (1) Whether the invention was commercially
24 successful as a result of the merits of the claimed
25 inventions (rather than the result of design needs or market

1 pressure, advertising, or similar activities);

2 (2) Whether the invention satisfied a long-felt
3 need;

4 (3) Whether others had tried and failed to make the
5 invention;

6 (4) Whether others copied the invention,
7 understanding that there is no contention in this case that
8 Apple copied the patented technology;

9 (5) Whether there were changes or related
10 technologies or market needs contemporaneous with the
11 invention;

12 (6) Whether the invention achieved unexpected
13 results;

14 (7) Whether others in the field praised the
15 invention;

16 (8) Whether persons having ordinary skill in the
17 art of the invention expressed surprise or disbelief
18 regarding the invention;

19 (8) -- excuse me --

20 (9) Whether others sought or obtained rights to the
21 patent from the patent-holder;

22 And (10) whether the inventor proceeded contrary to
23 accepted wisdom in the field.

24 In support of obviousness, you may also consider
25 whether others independently invented the claimed invention

1 before or at about the same time as the named inventor
2 thought of it.

3 If you find that Apple has proved obviousness by
4 clear and convincing evidence, then you must find that that
5 claim is invalid.

6 Apple contends that Claim 26 of the '772 patent is
7 invalid for failure of the patent to provide an adequate
8 written description of the claimed invention. Apple must
9 prove by clear and convincing evidence that these claims
10 lacked an adequate written description.

11 In deciding whether the patent satisfies this
12 written description requirement, you must consider the
13 description from the viewpoint of a person having ordinary
14 skill in the field of the technology of the patent when the
15 application was filed.

16 The written description requirement is satisfied if
17 a person having ordinary skill reading the original patent
18 application would have recognized that it describes the full
19 scope of the claimed invention as it is -- as it is finally
20 claimed in the issued patent; and that the inventor actually
21 possessed that full scope by the filing date of the original
22 application.

23 The written description requirement may be
24 satisfied by any combination of the words, structures,
25 figures, diagrams, formulas, et cetera, contained in the

1 patent application.

2 The full scope of a claim or any particular
3 requirement in a claim need not be expressly disclosed in the
4 original patent application if a person having ordinary skill
5 in the field of the technology of the patent at the time of
6 filing would have understood that the full scope or missing
7 requirement is in the written description in the patent
8 application.

9 Now, several times in my instructions I've referred
10 to a person of ordinary skill in the field of the invention.

11 Smartflash proposes that a person of ordinary skill
12 in the art would have a Bachelor's degree in electrical
13 engineering or its equivalent, or at least five years of
14 experience in manufacturing or engineering with significant
15 exposure to the digital content distribution and/or
16 e-commerce industries.

17 Apple proposes that a person of ordinary skill in
18 the art would alternatively have (1) at least a Bachelor's
19 degree in electrical engineering, computer science, or a
20 telecommunications-related field, and at least three years of
21 industry experience that included client-server
22 data/information distribution and management architectures;

23 Or (2) at least a bachelor of science degree in
24 electrical engineering, computer science, or
25 telecommunications-related field, and at least three years of

1 industry experience in that -- that includes client-server
2 computer data/information distribution and management
3 architectures.

4 If the person had one or more graduate degrees in
5 the above fields, the amount of industry experience required
6 for that person to be of ordinary skill in the art would be
7 reduced accordingly.

8 If you find that Apple has infringed any valid
9 claim of Smartflash's patents-in-suit, you must then consider
10 what amount of damages to award to Smartflash.

11 I'll now instruct you about the measure of damages.
12 By instructing you on damages, I'm not suggesting which party
13 should win this case on any issue.

14 The damages you award must be adequate to
15 compensate Smartflash for any infringement you may find.

16 Damages are not meant to punish an infringer.

17 Smartflash has the burden to establish the amount
18 of its damages by a preponderance of the evidence.

19 The patent owner is not entitled to damages that
20 are remote or speculative.

21 Smartflash seeks damages in the form of a
22 reasonable royalty.

23 A reasonable royalty is defined as the money amount
24 Smartflash and Apple would have agreed upon as a fee for
25 Apple's use of Smartflash's invention at the time the

1 infringement began.

2 The determination of a damage award is not an exact
3 science, and the amount need not be proven with unerring
4 precision. You may approximate, if necessary, the amount to
5 which the patent owner is entitled.

6 In such case, while the damages may not be
7 determined by mere speculation or guess, it is proper to
8 award a damages amount if the evidence shows the extent of
9 the damages as a matter of just and reasonable inference.

10 I'll give more detailed instructions regarding
11 damages shortly. Note, however, that under the patent laws,
12 Smartflash is entitled to recover no less than a reasonable
13 royalty for each infringing sale or use of its inventions.

14 A royalty is a payment to a patent-holder in
15 exchange for the right to make, use, sell -- excuse me --
16 make, use, or sell the claimed invention.

17 A reasonable royalty is the amount of money to be
18 paid for a license to make, use, or sell the invention that a
19 willing patent owner and a willing prospective licensee would
20 have agreed to immediately before the infringement began as
21 the part of hypothetical negotiation.

22 In considering this hypothetical negotiation, you
23 should focus on what the expectations of the patent-holder
24 and the infringer would have been had they entered into an
25 agreement at that time and had they acted reasonably in their

1 negotiations.

2 In determining this, you must assume that both
3 parties believed the patent was valid and infringed and the
4 patent-holder and infringer were willing to enter into an
5 agreement.

6 The reasonable royalty you determine must be a
7 royalty that would have resulted from this hypothetical
8 negotiation and not simply a royalty either party would have
9 preferred.

10 Evidence of things that happened after the
11 infringement first began may be considered in evaluating the
12 reasonable royalty only to the extent that the evidence aids
13 in assessing what royalty would have resulted from a
14 hypothetical negotiation.

15 For the patents-in-suit, the dates of the
16 hypothetical negotiations are as follows:

17 For infringement of the '720 patent, June of 2009.

18 For infringement of the '221 patent, February 2012.

19 For infringement of the '772 patent, December 2012.

20 In determining the reasonable royalty, you should
21 consider all the facts known and available to the parties at
22 the time the infringement began. Some of the kinds of
23 factors that you should consider in making your determination
24 are:

25 (1) The royalties received by the patentee for

1 licensing of the patents-in-suit tending to prove --
2 patent -- I'll start over.

3 The royalties received by the patentee for
4 licensing of the patents-in-suit proving or tending to prove
5 an established royalty;

6 (2) The rates paid by the licensee for the use of
7 other patents comparable to the patents-in-suit;

8 (3) The nature and scope of the license as
9 exclusive or non-exclusive or as restricted or non-restricted
10 in terms of territory or with respect to the parties to whom
11 the manufactured products may be sold;

12 (4) Whether the patent owner had an established
13 policy of granting licenses or retaining the patented
14 invention as its exclusive right or whether the patent owner
15 had a policy of granting licenses under special conditions
16 designed to preserve its monopoly;

17 (5) The nature of the commercial relationship
18 between the patent owner and the licensee, such as whether
19 they are competitors or whether their relationship was that
20 of an inventor and a promoter;

21 (6) The effect of selling the patented specialty
22 in promoting sales of other products of the licensee, the
23 existing value of the invention to the licensor as a
24 generator of sales of his non-patented items, and the extent
25 of such derivative or convoyed sales;

1 (7) The duration of the patent and the term of the
2 license;

3 (8) The established profitability of the product
4 made under patents, its commercial success, and its current
5 popularity.

6 (9) The utility and advantages of the patented
7 invention over the old modes or devices, if any, that had
8 been used for achieving similar results;

9 (10) The nature of the patented invention, the
10 character of the commercial embodiment of it as owned and
11 produced by the licensor, and the benefits to those who have
12 used the invention;

13 (11) The extent to which the infringer has made
14 use of the invention and any evidence probative of the value
15 of that use;

16 (12) The portion of the profit or of the selling
17 price that may be customary in the particular business or in
18 comparable businesses to allow for the use of the invention
19 or analogous inventions;

20 (13) The portion of the realizable profits that
21 should be credited to the invention as distinguished from
22 non-patented elements, the manufacturing process, business
23 risks, or significant features or improvements added by the
24 infringer;

25 (14) The opinion and testimony of qualified

1 experts;

2 And (15) the amount that a licensor (such as the
3 patentee) and a licensee (such as the infringer) would have
4 agreed upon at the time the infringement began if both sides
5 had been reasonably and voluntarily trying to reach an
6 agreement; that is, the amount which a prudent licensee who
7 desired, as a business proposition, to obtain -- obtain a
8 license to manufacture and sell a particular article
9 embodying the patented invention would have been willing to
10 pay as a royalty and yet be able to make a reasonable profit
11 and which amount would have been acceptable to a prudent
12 patentee who was willing to grant a license.

13 No one factor is dispositive, Ladies and Gentlemen,
14 and you can and you should consider the evidence that's been
15 presented to you in this case on each of these factors.

16 You may also consider any other factors which in
17 your minds would have increased or decreased the royalty the
18 infringer would have been willing to pay and the patent owner
19 would have been willing to accept, acting as normally prudent
20 business people.

21 Damages should be apportioned to the value
22 contributed by the invention; that is, Smartflash must
23 apportion the damages between the portion of the accused
24 products that are the patented features or components and the
25 unpatented features and components of the accused products.

1 Therefore, except as specifically provided in these
2 instructions, when applying the 15 factors I've just
3 discussed with you, you should only consider as the royalty
4 base the portion of the value that is attributable to the
5 patented features or components as compared to the portion of
6 the value associated with other features or components, such
7 as unpatented elements, features, components, or improvements
8 developed by Apple.

9 The law allows for the recovery of damages based on
10 the value of an entire product containing several features or
11 components only when the patented invention constitutes the
12 basis for consumer demand for the entire product.

13 Accordingly, if you find that Smartflash has proven
14 by a preponderance of the evidence that the demand for
15 Apple's accused products is alone motivated by the patented
16 invention, then you may award damages based on the entire
17 value of those accused products.

18 However, if you find that consumer demand for the
19 products is not based solely on the patented invention, you
20 should not -- you should award damages based on the value of
21 the patented invention and not the entire value of the
22 accused products.

23 With those instructions, Ladies and Gentlemen, you
24 will now hear closing arguments from counsel from each of the
25 parties.

1 The Plaintiff may now present its first closing
2 argument.

3 MR. WARD: May it please the Court.

4 THE COURT: You may proceed.

5 MR. WARD: Counsel.

6 MR. ALBRITTON: Yes, sir.

7 MR. WARD: Members of the Jury, good morning.

8 I'm lucky. I'm the one who gets to thank you
9 first, to thank you for your service. You volunteered a
10 little over a week ago to show up for jury service.

11 You didn't necessarily volunteer to be on this
12 jury, but we drafted you to be on the jury, and you've worked
13 hard and you've paid close attention, and we appreciate that.

14 Every time I look at a jury, I'm reminded that we
15 live in the greatest country in the world. It's a country
16 where a man like Patrick Racz gets to get on a level playing
17 field with a company the size of Apple, and it's a country
18 where a company like Apple gets to present its defenses to a
19 jury and you-all get to decide who is right in this case.

20 While Apple may make some great products, you've
21 gotten to see something that goes on behind the scenes, how
22 they don't respect Smartflash's intellectual property. You
23 get to see behind the scenes of Apple, and you've gotten to
24 see a little bit about this entity referred to as Apple
25 Legal.

1 I want to go through the evidence and remind you
2 what we think the evidence has shown and how it instructs
3 your verdict in this case. These are the topics that I'll
4 cover -- infringement, willful infringement, validity, and
5 damages. You'll see those in the questions that you're going
6 to be asked.

7 Apple infringes. I remind you briefly about the
8 burden of proof. You've heard about the preponderance of the
9 evidence. It's described as the greater weight and degree of
10 the incredible testimony. That is our burden in this case.

11 We've got to prove to you that Apple infringes by a
12 preponderance of the evidence.

13 And you can see the citations to the Court's jury
14 instructions. If you want to -- to read these, you're going
15 to have them and you can -- you can read them at your leisure
16 once you go back to the jury room.

17 But understand that we don't have to prove
18 knowledge of the patent in order to prove infringement.

19 We're going to talk about knowledge because there
20 is some evidence that Apple knew or should have known about
21 this patent.

22 I also want to remind you about the Court's
23 instruction about comparing the claims to the products
24 because that's the -- the comparison that you'll make for
25 determining whether or not Apple infringes, comparing the

1 claims at issue to its products.

2 You're specifically instructed not to compare the
3 accused product with an example from the patent or with the
4 patentholder's commercial products. You remember Apple did
5 that early in the case.

6 They started trying to show you this card reader.

7 You're instructed that's not what you do. That
8 might be -- in all these claims there might be a claim that
9 covered that, but the comparison you make is to the invention
10 that's claimed in the patent claims.

11 What did Mr. Racz testify that he invented? I
12 invented particular devices and methods for combining payment
13 functionality, secure downloading, storage, and rules for the
14 use of content on one portable device that you would carry
15 with you.

16 That word I highlighted "combining" is important
17 because every once in a while, someone comes up with a new
18 and unique way of combining known elements.

19 It wasn't combined by anyone prior to Mr. Racz,
20 that 1999 date that you've heard about, and that's the date
21 you consider for infringement. The later dates are relevant
22 for damages, but for infringement, you're looking at when did
23 he come up with his idea, and it was in 1999.

24 IBM didn't come up with it. Motorola didn't come
25 up with it. Sun Microsystems didn't come up with it. And

1 certainly Apple did not come up with it. They hadn't even
2 sold a cell phone until 2007.

3 They've wasted some of your time, in my opinion,
4 going through and saying you didn't invent the cell phone,
5 you didn't invent the microprocessor. You remember those
6 lists that we've been hearing about?

7 But if you'll look at the Court's instruction on
8 Page 14, His Honor has instructed you: Most, if not all,
9 inventions rely on building blocks of prior art. Think about
10 that. Folks are combining known building blocks into new and
11 unique inventions, and that's -- that's what is entitled to a
12 patent.

13 Smartflash is the -- the party in this case that
14 walked you through each of these claims, and I know it took
15 time, but we had to jump through each box. We had to check
16 each box because Apple admits nothing. They admit nothing in
17 this case. We've proven it.

18 I remind you how we proved it. You remember all
19 those boards that Dr. Jones got up and Mr. Curry tacked on
20 the evidence that he looked at, the software code, the screen
21 captures, the testimony. He checked each box for you.

22 Remember this testimony from Mr. Mirrashidi. The
23 truth is the code. Remember that? The truth is the code.

24 So if the code is the truth, what do we know? We
25 know that no witness from Apple, no employee of Apple

1 reviewed the code to come in here and say it doesn't operate
2 the way that Dr. Jones told you it operated.

3 Dr. Ligler didn't review the relevant code.
4 Mr. Wechselberger, he didn't review the code. Why is that?

5 Why won't they look at their own code? It's
6 because if they took the stand, they know they'd be under
7 oath, and they'd have to admit infringement.

8 These are the disputed elements that -- that seem
9 to come out during the testimony. Payment elements, use
10 access rules, data supplier.

11 Remember this chart from Dr. Jones describing how
12 their system works, specifically walking you through the
13 source code? And Mr. Mirrashidi confirmed that the Apple ID
14 is used to make purchases. Yes, sir.

15 Use and access rules. Again, Dr. Jones walked you
16 through exactly how those use and access rules worked. He
17 didn't have to do it by reading slides. He understands how
18 the code works. He understands how their products work. He
19 got down here in front of you and explained these things to
20 you.

21 Remember this? The code -- only one expert looked
22 at the code on any of these rules. It was almost as if Apple
23 was saying, don't look, don't look, let's frog march Mr. Racz
24 out of the courtroom. They don't want anyone to look at the
25 code, including their own employees, because the code

1 confirms what we've been telling you, and that is that these
2 products infringe.

3 Data supplier. This is probably one of the most
4 interesting arguments, and it tells you about the credibility
5 of Apple's positions in this case.

6 Remember this diagram from Farrugia? Mr. Farrugia
7 put this up here and tried to say, look, the content is
8 coming from Akamai, this third-party -- this third-party
9 content delivery network.

10 Yet on cross-examination, he said: You're right,
11 it actually comes from Apple iTunes. It goes over to Akamai,
12 and it's delivered to the end-user device.

13 And Mr. Mirrashidi, when he was under
14 cross-examination, admitted Apple then takes the encrypted
15 file and supplies that data to the user via Akamai, correct?
16 They confirmed these things.

17 And here's the questions that you'll be asked. Did
18 Smartflash prove by a preponderance of the evidence that
19 Apple infringes these claims? I submit to you the answer to
20 those questions is yes.

21 Willful infringement is the instruction that you'll
22 get. Willfulness requires you to determine by clear and
23 convincing evidence that Apple acted recklessly.

24 Here are the things that you consider to consider
25 whether or not Apple acted recklessly, whether or not their

1 actions constituted an unjustifiably high risk of
2 infringement of valid patents. And these are the things that
3 you can look at, and they're in the instructions.

4 Did you find it interesting that not a single
5 witness could be bothered with reviewing patents other than
6 the 15 minutes prior to when they walked into their
7 deposition?

8 Then Mr. Mirrashidi said, yeah, you know, I decided
9 I'd better read the patents when I figured out I was going to
10 have to come to court in Tyler, Texas, and maybe answer
11 questions about it. That's years after they've been sued do
12 they finally get around to bo -- bothering to read these
13 patents.

14 What about Mr. Farrugia? This gentleman, he told
15 us he was a director at Gemplus. Consider his credibility.
16 Y'all saw the -- the transcripts from prior testimonies that
17 he gave.

18 Remember when he was under oath prior to this case,
19 he said he was an expert in securing digital content. He
20 came straight from Gemplus to Apple. He had DRM experience
21 from Gemplus.

22 Yet what does he say when he gets under oath in
23 this case? He says, forget about that, I'm not an expert in
24 securing digital content. There was a gap between my
25 employment. I didn't have any DRM experience prior to coming

1 to Apple. Why would he be taking those positions in this
2 case which are 180 degrees contrary to the sworn testimony
3 that he gave in a preceding case? Consider that.

4 Consider the fact that Apple saw fit to pay fact
5 witnesses in this case to shield us from talking to those
6 witnesses. You saw the email where witnesses were contacting
7 counsel for Apple saying I'm getting calls from this lawyer
8 in Texas, and what do they say? Don't talk to them. Let's
9 sign this engagement agreement. We'll take care of you.

10 Willfulness. I submit to you the answer to these
11 questions is yes.

12 Validity. You're instructed that there is a
13 presumption -- a presumption of validity, and that's because
14 the Patent Office has looked at these patents, they've
15 considered the patents in the face of the prior art, and have
16 decided to issue the patents.

17 And remember who has the burden of proof. That
18 burden of proof is on Apple, and they must prove to you by
19 clear and convincing evidence, and the Court defines that to
20 you, an abiding conviction that the truth of the parties'
21 contentions are highly probable.

22 And who do they bring to you to meet that burden?
23 Mr. Wechselberger, the man that doesn't even know what the
24 burden of proof is, yet he'll crawl up on that witness stand
25 and tell you to invalidate Mr. Racz's property. Didn't even

1 know what the burden of proof was.

2 The only thing, I submit, is highly probable is
3 that Mr. Wechselberger could not tell you about any of the
4 prior art without reading it from a slide, racing through it.

5 I felt sorry for you. I couldn't keep up with it.
6 I've never seen a mess like this. And if you couldn't keep
7 up, you were not alone. I've been doing patent cases for
8 over 10 years, and I couldn't keep up with what he was
9 saying. And they want to submit to you that that's clear and
10 convincing evidence.

11 The only time I really understood this was when Dr.
12 Jones took the stand and came down here without notes,
13 without prompting, and described to you why what they were
14 telling you was not, in fact, true.

15 It's their burden. Yet they want to tell you,
16 well, they're anticipated. And if they're not anticipated,
17 all these patents are obvious. And if we're wrong there,
18 well, they're invalid for written description.

19 I mean, which defense are they going to light on?
20 Let's see if they'll get up here and light on a defense in
21 their closing and say, yeah, we probably did confuse you, and
22 we've got our grab bag of prior art and I'm going to make
23 sense for it.

24 Let's see if they'll get up and explain something
25 that's coherent. They're not going to. Their intention is

1 to confuse you so that when they get to cross-examine Dr.
2 Jones, they say, we'll -- look, we'll pick something out of
3 this prior art, we'll pick something out of this prior art.

4 As the Court instructed you, that's not good
5 enough. It's obvious that there are building blocks that are
6 there, but they've got to prove to you why one of skill in
7 the art would have been motivated to combine those building
8 blocks, as they say. These patents are not invalid, and
9 Apple has not met its burden.

10 It paid fact witnesses -- all those folks on the
11 prior art and kept us from talking to them. Turned out, it
12 didn't matter, I don't know, other than the fact that they're
13 willing to stoop to that level tells you something about the
14 levels to which Apple will go to avoid infringement.

15 The answer to these questions is no.

16 This is really a case about damages. We've got to
17 jump through the hoops to get to damages, right? They tell
18 you we don't trespass; but if we do, the deed is no good.
19 It's no good for all these reasons. And if we're wrong
20 there, well, we don't really owe that much money.

21 Smartflash is entitled to recover no less than a
22 reasonable royalty. We've brought you Dr. Wecker. He showed
23 you his survey results. And did you catch something during
24 the instructions? All that fighting over the words alone
25 motivated.

1 When you get back to the jury room, you'll see that
2 that's the burden that we've got to meet to prove damages to
3 you. On Page 21: Accordingly, if you find that Smartflash
4 has proven by a preponderance of the evidence that the demand
5 for Apple's accused products is alone motivated by the
6 patented invention.

7 You know what would happen if we didn't use alone
8 motivate? We'd be getting criticized. They'd be saying,
9 Ladies and Gentlemen, the -- the burden is alone motivated.
10 Because you heard Dr. Dhar criticize us when we just used the
11 word "motivated." He said, oh, they didn't say "alone." We
12 go back and we conduct a survey with the words alone
13 motivated in it, and he says, oh, that's confusing to them.

14 You can't rely on that.

15 But what do Apple's own documents show? Now, is
16 this document saying this is the only reason folks bought
17 their products? No, because they're not going to show you
18 that survey. They don't want to pay for that survey. They
19 know what the answers are. They know we're spot on. Their
20 own surveys, 43 percent of folks say they wanted a phone that
21 combined music, email, web, and downloading games and apps,
22 wanted to use apps.

23 Dr. Dhar told you, I could run a survey, but no one
24 asked me to. Instead, Apple said spend \$300,000 running
25 surveys to say why their surveys are no good. What does that

1 tell you? They're not interested in showing you what the
2 value of these features are. We are. We're the ones who
3 conducted the survey. That's our burden. And we gladly meet
4 it. And it's a lot of money.

5 Just 23 percent of infringing sales is \$43.4
6 billion. It is a lot of money. They've made a lot of money
7 using Mr. Racz's invention.

8 Mr. Mills walked you through the reasonable royalty
9 rates. You're to award damages for the use made of the
10 invention by the infringer. But in no event, less than a
11 reasonable royalty.

12 \$852 million, and I don't tell you that number
13 saying you know what, that's where this -- we got a high ask.
14 Shave some off of it, and we'll be happy because we walked
15 through how we did this math and we walked through what Apple
16 keeps, even under this royalty analysis.

17 77 percent of infringing units, not included.
18 Content revenue, not included. Revenue from music and books,
19 not included. We used the lower end of the -- the bounds,
20 right? If we'd used the midpoint, we'd be entitled to
21 another \$350 million, but we're not in here saying give us
22 \$1.2 billion. We're saying, here's the conservative number
23 using the surveys, using the damages that Mr. Mills
24 calculated, \$852 million.

25 And they keep what? \$42.6 billion.

1 And without hesitation, I tell you that's what the
2 number is. That is the fair compensation for Apple's use of
3 Mr. Racz's invention. They seem like they're offended.
4 They'll jump up and say \$43 billion. \$43 billion, how
5 offensive is that? We want to keep it all, except for 4.5
6 million. That's Apple's position.

7 And what do they tell you -- what do they tell you
8 about how you ought to calculate damages because what they
9 tell you ought to tell you a lot about what Apple thinks
10 about people like Mr. Racz and what they think about people
11 who are not other big companies, because they brought you Dr.
12 Becker and he said this is the number, 4.5 million. And
13 think about how he went about calculating that.

14 He said, well, let's look at what Mr. Racz had
15 available to invest in the market. We're not going to look
16 at the patented features. It's not possible to do that,
17 right? That's their story. You can't do that. It's not
18 possible, despite Dr. Dhar saying you can do it.

19 Dr. Becker says we're going to invest that \$3
20 million. It's going to grow between 30 and 20 and we'll take
21 a market share and we'll reduce it some to 4-and-a-half
22 million, that's what's fair.

23 But wasn't it interesting that when it was Apple's
24 ox getting gored, they had a different approach? When Mr.
25 Muller was on the stand and I said: Mr. Muller, what if it

1 was your piece of property and Exxon had come out there and
2 drilled a well and was pumping oil and it was the motherload
3 and they made \$43 billion; and they said, you know what,
4 instead of paying me for what we took from your property, if
5 you only invested 3 million in it, let's just do some quick
6 math. We'll run it through the market. We'll do Exxon's
7 market share, and we'll tell you 4-and-a-half million dollars
8 and we'll call it a day.

9 THE COURT: You've used 18 minutes, Counsel.

10 MR. WARD: Do you remember what his answer was when
11 I asked: Do you think that's fair? No, that doesn't sound
12 fair. But then flip the tables and do exactly what they want
13 to do to Mr. Racz, and it's Apple's position, that's fair,
14 4-and-a-half-million dollars is fair.

15 I'm going to sit down. Apple's going to have an
16 opportunity to talk to you. And make sure they talk to you
17 about the evidence. See if they'll talk to you about the
18 evidence, as the Court has instructed the evidence to be
19 applied -- or the law to be applied to that evidence.

20 I bet if they don't, my co-counsel, Mr. Caldwell,
21 will point it out.

22 Thank you again for your time and your service.

23 THE COURT: All right. The Defendant may present
24 its closing argument.

25 Counsel, you may proceed.

1 MR. BATCHELDER: Thank you, Your Honor.
2 Counsel.

3 Ladies and Gentlemen, every trial has a story, and
4 Smartflash would have you believe that the story of this
5 trial began in 1999. But, in fact, we heard from
6 Mr. Wechselberger it actually began several years earlier in
7 the mid-1990s as a result of some improvements in the
8 industry at the time.

9 Let me pause us here and address the comments we
10 just heard about Mr. Wechselberger. He was criticized for
11 not telling you what the legal burden is in this court.

12 Well, who's job is that? His Honor just explained
13 to you what the legal burden is. It's a legal issue.
14 Mr. Wechselberger is not a lawyer. He's an expert in this
15 industry. And as we'll hear, that was not true of Mr. Racz.

16 Mr. Wechselberger came in and explained that in the
17 1990s, some improvements happened, created some opportunities
18 but also some challenges. All of a sudden we had portable
19 music players. We had fast downloading of these digital bits
20 over the Internet. We had easy copying as a result of that;
21 and also as a result, we had some piracy.

22 So because of all those things that were happening
23 in the mid-1990s, as he explained, experts everywhere in the
24 industry -- in the consumer electronics industry were
25 figuring out ways to allow those kinds of things, content

1 like music and movie apps to be sold over the Internet, but
2 protect them from piracy.

3 And he put up this timeline, and I'm sure you'll
4 remember. He walked us through all this prior art, because
5 all these engineers from these world leading technology
6 companies were working on this very problem.

7 Mr. Wechselberger showed for every one of these
8 references, putting them on the left and Smartflash on the
9 right, that they recognized first this problem of piracy in
10 this industry result of the factors that we've been talking
11 about.

12 And, again, putting the reference on the left and
13 Smartflash on the right, as he does here, he showed that
14 every component that Mr. Racz came along later to say, hey, I
15 think we should use these to tackle this problem, all of
16 these other references, every single one of them had already
17 disclosed using those very components for that very problem.

18 Using this Gruse/IBM example, again,
19 Mr. Wechselberger showed you, taking the figures from the
20 patents themselves, he showed every single step that was
21 disclosed in these patents for accomplishing these purchase
22 transactions -- again, to sell content over a network like
23 the Internet, protected, pay electronically, the very problem
24 this industry was confronting; and all of these references
25 talked about various ways to do it, including the way that

1 Mr. Racz came along later and said he had thought of first.

2 And he didn't stop there. Mr. Wechselberger went
3 on and for every single claim -- he was up there for three
4 hours, teaching these references. And for every single claim
5 and every single limitation of the claim, every requirement,
6 he showed exactly where in each reference it was disclosed.

7 And so here you have, for example, this -- the red
8 limitation at the bottom from the claim, and he put right
9 next to it exactly where in the IBM/Gruse patent that element
10 was met. And he did it element-by-element-by-element.

11 And he didn't just do it for one reference, for
12 each claim, he walked you through multiple references. And
13 here we have four blue checks. And you may remember, he said
14 I only need one to invalidate this claim, but here are four
15 of them.

16 These claims are not just invalid, they're invalid
17 many times over. Mr. Racz was not the first to think of this
18 idea.

19 And is this hindsight? Is this a he-said, she-said
20 situation? No, again, these are patents. These prior art
21 patents are dated. They're written documents submitted to
22 the government. There's no dispute about what they say or
23 when they said it. All of it was before Mr. Racz came along.

24 Now, Mr. Jones came in here yesterday and said,
25 yeah, I think Mr. Wechselberger left out a couple things. In

1 the IBM/Gruse patent, he said I don't think that the
2 IBM/Gruse patent discloses payment data stored on the data
3 carrier. But I got a chance to question him and he admitted
4 that it does.

5 And then he said what about that Poggio/Sun
6 reference that Mr. Wechselberger used to combine with some of
7 the other references to show payment before content? And Mr.
8 Jones said, I don't think the Poggio reference discloses
9 that; and, again, when I got a chance to question him, he
10 admitted that it does. Prepayment for content? Answer, yes.

11 So long before Mr. Racz came along, things he put
12 in his patent claims were already disclosed in writing and
13 would have been obvious to engineers at the time.

14 Now, were they obvious to Mr. Racz? The answer is
15 no. And that's understandable because he does not have a
16 background in this field. And his background was in water
17 faucets. And there's nothing wrong with that, of course, but
18 the Court has told us in its instructions -- and you'll get a
19 written copy -- that the standard for obviousness is based on
20 a person of ordinary skill in the art in this field, in the
21 field of these patents; and Mr. Racz has admitted he's not
22 that guy.

23 He's not a person of ordinary skill in the art in
24 the field of these patents. Mr. Wechselberger, on the other
25 hand, has exactly those qualifications. So he's the right

1 guy to speak to this.

2 And remember there's no evidence whatsoever that
3 any of these references were considered by the Patent Office
4 when they issued Mr. Racz's patents. None of them appears on
5 the face sheet of any of these patents.

6 Let's talk about a couple of sanity checks for how
7 these patents are invalid. One is, we know that Mr. Racz did
8 not invent anything new because of what happened to his
9 business, that he said he started to commercialize what he
10 said was his invention.

11 If he had invented some hot, new technology, you
12 think he would have shouted it out to the world and that his
13 company would have thrived.

14 Well, instead, how did he describe his business,
15 Internet Plc? He said commercializes invention. He said --
16 you may remember -- he reluctantly admitted that he said our
17 business is in promotional marketing, not technology.

18 And, of course, his company spiralled along for a
19 few years, ultimately lost millions of dollars and went
20 bankrupt.

21 Another important question: What do other people,
22 people outside this courtroom with nothing to benefit, no
23 interest in the outcome here, what do they say? Did they
24 agree with Mr. Wechselberger? Remember what happened when
25 Mr. Racz reached out to InterTrust, an expert in this field.

1 He said, hey, I've got this patent, I think it's a
2 great idea. Please invest. And how did they respond?

3 Right there on the screen, our guys were pretty
4 thorough in their investigation. Their feeling was that the
5 claims were broad, but there was generally little that gave
6 highly significant or distinctive advances over any prior
7 art. That's just what Mr. Wechlesberger came in and said.

8 And, again, one course, one of the references that
9 he pointed to was the Ginter/InterTrust patent.

10 Ginter/InterTrust itself from this InterTrust
11 Company, the experts that Mr. Racz acknowledged and reached
12 out to, they had already thought of this stuff themselves.

13 Now, how did Mr. Racz respond to this? Did he say,
14 InterTrust, what are you talking about? I reached out to you
15 and you said there's really nothing distinctive over the
16 prior art. What do you mean? What prior art? He didn't do
17 that. He never called back. He never wrote back. He hasn't
18 spoken to them since.

19 Now, we're going to put up this board what I'm sure
20 you'll remember from the opening that Mr. Caldwell did in
21 this case. So in his opening statement -- and they've said
22 that this is what shows what Mr. Racz thought of -- thank
23 you -- thought of before anyone else.

24 And you also may remember that when he was done, I
25 got up and I used their slide in my opening. And I made a

1 commitment to all of you. I said, I'm going to cross-examine
2 Mr. Racz this afternoon. That was the first day of trial.

3 And he will admit he did not invent any of this,
4 even though they say that this is the thing that they -- that
5 shows what Mr. Racz thought of first. And I hope you
6 remember that I made good on that commitment.

7 So here's what Mr. Racz had to say. Didn't invent
8 MP3 players. That's an MP3 player in the patent. Didn't
9 invent downloading content over the Internet. Didn't invent
10 payment data. Didn't invent using payment data online.

11 What about rules? Didn't invent use rules in
12 connection with online sale of content. Didn't invent use
13 rules. Didn't invent access rules or access rules in
14 connection with the online sale of content. There is nothing
15 here that Mr. Racz thought of first. There's nothing here
16 that he invented.

17 And they're saying, well, maybe he was the first to
18 combine them. Mr. Wechselberger showed exactly the opposite.
19 He showed that all of these components were combined in these
20 prior art references before Mr. Racz came along.

21 So he made all those admissions in his
22 cross-examination. And if he really was the first to think
23 of something, taking these old elements and combining them in
24 some new way, you really would have thought that he would
25 have come back up on redirect examination and said so.

1 And, in fact, Mr. Caldwell promised that that was
2 going to happen. He was asked -- remember, when I finished
3 my cross toward the end of the day and His Honor said this is
4 a good juncture, Ladies and Gentlemen, recess for the day.

5 I assume the Plaintiff has redirect of this
6 witness.

7 Mr. Caldwell: Absolutely, Your Honor.

8 We broke for the day, came in the next morning, and
9 what happened?

10 His Honor asked: Does the Plaintiff additional
11 redirect?

12 Mr. Caldwell: No, Your Honor, we don't. No
13 further questions.

14 And we never heard from Mr. Racz again in this
15 trial. He never came in and explained why if he didn't
16 invent any of his, somehow his patents -- his patented claims
17 here should be found valid.

18 Ladies and Gentlemen, these four patent claims are
19 not valid, and it is wrong that Apple is here being sued on
20 invalid patent claims.

21 Let me now turn to what happened in the 1990s back
22 to the time frame showing that Apple does not infringe.

23 Remember there was iTunes Invention of the Year
24 Award in 2003, the Apple iPhone in 2007. What was Mr. Racz
25 saying in 2009? When he was pointing out who he felt was an

1 infringer, was he pointing to Apple? No, he was pointing to
2 SanDisk and other entities, not Apple. That tells you a lot.

3 This is an unfounded accusation of infringement.
4 But this Court is giving you tools to stop it. Because it
5 said to infringe, you have to prove each and every
6 requirement recited in the claim, each and every requirement.

7 It's not horseshoes. It's not hand grenades.
8 Close is not good enough. You have to prove every element
9 and it is their burden to do that and they have not met that
10 burden.

11 Now, is there a dispute about how Apple's products
12 work? Their own man, Dr. Jones, said no. Have you heard of
13 anyone at Apple disagree with how you say Apple's products
14 work? No, I haven't. For goodness sakes, Apple's
15 witnesses -- Apple's engineers wrote the code.

16 We all know how it works, and everybody agrees on
17 that. The question is, do these legal requirements set forth
18 in the claim, are they met? So this truth is in the code.
19 That's a sideshow. Of course, the truth is in the code. But
20 everyone agrees what the code says and everyone agrees how
21 the products work.

22 Thank you.

23 And the way they work turns out to be different and
24 better, frankly, than the way these patents say to do it.

25 So here's one example. The patent claim requires

1 three things. Once a user selects content, it requires
2 payment, it requires that payment be validated; and only
3 after it gets validated, does the content get retrieved. So
4 you've got to pay -- you pay for it. That payment gets
5 validated.

6 Only then do you get the stuff, the song, the
7 music, the app, the movie. That's not the way Apple's
8 products work, and everybody agrees with that.

9 As we saw both from Mr. Mirrashidi and from
10 Mr. Wechselberger, Apple's system relies on something called
11 sessions. Because if every time you bought something, every
12 time you bought a song Apple's system had to charge a credit
13 card, they'd have to pay a fee to the credit card company for
14 that.

15 So instead, they basically batch pay. They batch
16 all these sessions.

17 So if you look right under the box on the left, you
18 ask to buy this song for \$1.29, and it logs it. The site
19 remains open for either 84 hours, until you've hit \$9.99
20 worth of content; and before that, there is never any
21 payment.

22 So you send up the buy request. You get the
23 download response, that blue box. You get your content, the
24 song. There's been no payment. And yet it's that blue box
25 that Dr. Jones comes in here and said, that's payment

1 validation data. There's been no payment. How could it be
2 validated? Apple doesn't do what this claim requires.

3 And, again, we're not living in a land of
4 horseshoes and hand grenades. You can't be, well, it's kind
5 of like that. It has to be the same thing, and it's not. It
6 does not infringe, under the Court's instructions to you-all.

7 Here's another example. Claim 13 of the '720
8 patent, code to read payment data from the data carrier. All
9 of these claims require, and everybody agrees with this, that
10 there's got to be payment data on the phone itself. And it
11 has to be sent every time there's some kind of a purchase.

12 THE COURT: You've used 15 minutes, Counsel.

13 MR. BATCHELDER: Thank you, sir.

14 Again, that's not the way Apple's products work.

15 So on the left of this slide, we have what
16 Smartflash's claims require. The payment data must be read
17 from the user device. It's got to be there, and it gets sent
18 up each time.

19 What happens with Apple? We talked about this in
20 my opening statement to you. With Apple, when you create an
21 iTunes's account, you provide your credit card. But after
22 that, that credit card gets stored on that Apple server at
23 the top of the screen. It's a secure server to protect the
24 customer's credit card.

25 Then when you buy a song or a movie or an app, you

1 never need to send that credit card. All you send is the ID
2 information. You see all that in the information packet, it
3 all ends in ID. That's identifier information. That's not
4 payment data.

5 Is there payment data in Apple's system? Yeah, you
6 bet. That's the credit card that goes from the server to the
7 bank. But is it sent from a user device from the phone? No.
8 It's not stored there.

9 And, again, why does Apple do it this way? Well,
10 if you store the credit card on the phone, someone can hack
11 it and steal the credit card, steal the identity of the
12 customer. Apple protects its customers. It does things
13 differently and better than these claims require.

14 And, again, it can't just be close. It has to be
15 exactly the same to infringe, as His Honor's instructions
16 have told you.

17 Also, how could this be payment data if the same
18 information, that same set of IDs is sent on the left even
19 when it's free? It's the same information each time. Free.
20 Not free. Does that sound like payment data to you? No,
21 it's identifier data.

22 Apple does not infringe these claims. What it does
23 is different. And that's all you need. But it's also
24 better. It protects its customers in a way that these
25 patents do not.

1 And remember, to be valid, the claim needs to
2 have -- have two requirements, as compared to the prior art.
3 It has to be new, and it can't be obvious. And these claims
4 fail those tests. And, again, obviousness is measured by one
5 of ordinary skill, and that's someone who Mr. Racz is not,
6 but Mr. Wechselberger is.

7 Ladies and Gentlemen, it's been an honor and a
8 privilege for me to spend this trial with you. I'm now going
9 to ask my friend and colleague, Mr. Albritton, to say a few
10 final words on behalf of Apple.

11 MR. ALBRITTON: May it please the Court.

12 THE COURT: You may proceed.

13 MR. ALBRITTON: Thank you.

14 Thanks, folks. I am going to visit with you about
15 damages; but I'm going to tell you straight up front, the
16 majority of the things that I'm going to talk to you about
17 now aren't going to matter because I agree with what Jim
18 Batchelder just told you: Apple does not use these patents,
19 and they are invalid.

20 But I have to talk to you about damages because
21 it's one of the issues that's potentially involved.

22 Whenever you do, Ladies and Gentlemen, one of the
23 things you have to think about first is: What is the
24 invention? There on the left where it say App Store process,
25 that's what Dr. Jones says Mr. Racz invented, a way to pay

1 for protected content on the App Store or when you buy
2 movies. I'm going to focus on apps for simplicity.

3 On the right, Ladies and Gentlemen, it's the exact
4 same thing, but all you've done is flipped one step. And Dr.
5 Jones yesterday told you that doesn't infringe.

6 So what's the point of that, Mr. Albritton? The
7 point of that is this, this invention, if it's in -- if it's
8 valid, is very, very narrow. And this invention only has to
9 do with the manner of payment.

10 So you might be asking yourself, well, if the
11 invention has to do with the way you pay for apps in the App
12 Store, well, then logically what they would be wanting is
13 some of the money Apple makes from selling apps, right? That
14 would be logical, and you would think that that's what they
15 would be asking for. But it's not, Ladies and Gentlemen.

16 Remarkably, what Smartflash is asking for is a --
17 is a portion of the revenue, the money, the sales, that Apple
18 makes from selling this device, the iPhone, the iPad, the
19 iPod Touch, products that were designed by Apple and that Mr.
20 Racz doesn't even claim he invented.

21 There's no dispute. He did not invent the iPhone.
22 All he claims he invented is what Dr. Jones says is the way
23 to pay for protected content bought over the Internet.

24 So I've got on the screen, Ladies and Gentlemen,
25 the formula. Remember, Dr. Becker worked through this with

1 you, okay? And I just want to focus on the royalty base
2 side.

3 On the royalty base side, you've got three inputs.
4 You've got the percentage -- I'm sorry, there's a
5 typographical error.

6 It's the number of U.S. phone units, okay, a
7 hundred percent of the U.S. phone units, multiplied by the
8 Wecker alone motivated question, multiplied by the average
9 unit revenue.

10 Two of those three things, of course, are not
11 controversial and come directly from Apple. So the only
12 thing that drives the damages, what Mr. Mills says that Apple
13 owes, in this -- for their primary model is the answer to
14 this alone motivated question.

15 Well, let's talk about alone motivated.

16 Mr. Ward stood up here and pointed it out to you,
17 and I couldn't agree more. His Honor says the only way that
18 they can get a percentage of all of that, the average
19 revenue, multiplied by all of the units, the only way they
20 can do it is if they show that consumers were alone
21 motivated.

22 And the Judge uses the word "solely." That means
23 that they bought this phone right here solely and exclusively
24 for the purpose of purchasing apps on the App Store.

25 Now, the beautiful thing about this system, and I

1 agree with Mr. Ward, I believe in this system. And the
2 beautiful thing is you come here with your common sense.

3 Ask yourself this: Does it make a lick of sense
4 that anybody, one person in the entire world would buy an
5 iPhone and not care about making calls on it? That's what
6 they want you to buy. That's what they're selling. And if
7 you don't buy that, this completely fails, Ladies and
8 Gentlemen.

9 You don't even have to just rely on your common
10 sense. This on the screen is the question that Dr. Wecker
11 asked. He said: Is the capability alone motivated? And
12 they had to ask that question. And Dr. Wecker said, 27
13 percent of the people said yes.

14 Well, Dr. Dhar came in and did a follow-up survey,
15 and he asked about other -- other features. And he said, for
16 instance, consider the capability to browse the web.

17 Does that motivate your purpose? He asked that for
18 a number of features. And you know what he found, Ladies and
19 Gentlemen? What he found was 100 percent of the people who
20 were asked about addit -- additional features said they were
21 motivated to buy the iPhone by those additional features. It
22 completely comports with common sense.

23 They come back and they say, well, if that's not
24 right, maybe we've got an alternative way. And they rely on
25 a different question. And they say this Wecker percentage of

1 value. Remember, it's telling us how much value, and they
2 asked about this capability to purchase apps, which isn't
3 even the invention. Mr. Racz admitted that, okay? And they
4 come up with an alternative way.

5 Also, curiously, that gets them to about \$800
6 million.

7 Well, Dr. Dhar went through and ran a -- a survey
8 to see if it made -- to see if it was valid. And what did he
9 show you? He said that when you ask about other features to
10 respondents and then they add up, they should add up to no
11 more than a hundred percent. In fact, less because he didn't
12 ask about all the features. 587 percent.

13 Dr. Dhar told you -- he showed you, Ladies and
14 Gentlemen, that the inputs right there, the alone motivate
15 percentage, the percent of value percentage are absolutely
16 flawed.

17 Dr. Dhar, you got to hear from him. And one thing
18 that I thought was so interesting about Dr. Dhar's testimony
19 is did Dr. Wecker say a single solitary word about what Dr.
20 Dhar did? No. Did he criticize Dr. Dhar in any way? No.

21 And the reason he didn't is because Dr. Dhar did it
22 right. His surveys show what common sense tells you. People
23 do not buy iPhones solely and exclusively for the purpose of
24 purchasing apps. It makes no sense. It is scientifically
25 invalid.

1 So, Ladies and Gentlemen, if you mark this out
2 because it doesn't make any sense and it's scientifically
3 invalid, the damages they ask for right here are wrong. And
4 why does that matter? Because His Honor told you that it is
5 their burden to prove damages.

6 Now, we also heard lots of questions of Dr. Dhar
7 about why did you not run your own survey? Dr. Dhar
8 explained to you, there are problems with running these kinds
9 of surveys. We also heard tons and tons about Apple's
10 surveys.

11 Let's look at this, Ladies and Gentlemen.

12 It conclusively proves that their point is wrong.
13 There are lots of reasons people buy iPhones. It is not
14 solely and exclusively because of the capability to purchase
15 apps. That makes this formula fail. That means they cannot
16 get to their damage number.

17 We heard Tim Cook talk about how great the
18 iStore -- the iTunes Store is and the App Store, and it is.

19 And that's because of the hard work of Apple's
20 engineers, not because of anything that Mr. Racz did related
21 to the way you pay for apps.

22 His Honor told you it is their burden to establish
23 damages by a preponderance of the evidence, and it can't be
24 remote and speculative. This, folks, is remote and
25 speculative. It is a scientific fact. It does not measure

1 what they claim it measures.

2 So who can you rely on? What's the only evidence
3 you got? It's the evidence from Dr. Becker, and Dr. Becker
4 relied on what really happened in the real world, not things
5 that were done solely and exclusively for the purpose of this
6 lawsuit.

7 THE COURT: Three minutes remaining, Counsel.

8 MR. ALBRITTON: Thank you, Your Honor.

9 I'd like to talk to you about Augustin Farrugia,
10 and one of the things the Judge tells you. In his charge, he
11 told you there is no contention in this case that Apple
12 copied the patented invention. But nevertheless what they
13 want to do is they want to vilify this man. They want you to
14 believe he's a bad guy. There's no sugarcoating it.

15 And you heard him. He's got a heavy, thick French
16 accent, not born in this country. It was difficult at best.

17 But we heard questions over and over about things
18 like: How many times have you been deposed? I mean, Ladies
19 And gentlemen, they have misrepresented the facts, and what
20 they're trying to sell you is this: That Augustin Farrugia
21 worked at Gemplus in the United States. Patrick Racz was
22 doing some work for Gemplus or doing some work with Gemplus
23 in Europe.

24 There's no evidence that Augustin Farrugia had any
25 involvement whatsoever with Patrick Racz. But they're trying

1 to say that this man who had decades of experience in
2 security, long before he came to Apple, they're saying that
3 Apple's technology is somehow built on some secret knowledge
4 he got. And that is wrong. That is a crazy conspiracy, and
5 I ask you to reject it.

6 Now, Ladies and Gentlemen, I got a couple of final
7 observations. And all of us lawyers have heard this corny
8 phrase: If the law is on your side, you argue the law. If
9 the facts are on your side, you argue the facts. And if you
10 got neither, you just argue real loud.

11 Well, what I suggest to you, Ladies and Gentlemen,
12 is there's been a lot of real loud arguing on this side.

13 And let me give you a few examples. We have these
14 Apple engineers. Max Muller sat at that stand, and they
15 said: Well, you're not here to offer any opinion about
16 infringement, are you? Ah-ha. Well, the Judge -- you know
17 from hearing the charge, fact witnesses like Payam Mirrashidi
18 and Max Muller, they're here to talk about the facts.
19 Experts offer opinions.

20 So why are they giving you all those diversions?
21 It's because they know that the facts and the law are not on
22 their side.

23 Same thing, Ladies and Gentlemen, about
24 non-infringing alternatives. How crazy is this? Of course,
25 Apple didn't identify one because we don't infringe. But we

1 darn sure know that there are other ways to do it because Dr.
2 Jones specifically told you that.

3 They also say Apple's engineers didn't read these
4 patents. Well, Ladies and Gentlemen, there are lawyers, lots
5 of us on both sides, and it's our job to handle these legal
6 issues, not the job of engineers. Their job is to build
7 beautiful, wonderful products like the iTunes Store and the
8 App Store; and that's what they did, Ladies and Gentlemen.

9 So I ask --

10 THE COURT: Your time is up, Counsel. Take 10
11 seconds.

12 MR. ALBRITTON: Thank you, Your Honor.

13 So the answer -- the right answer to the questions
14 are no infringement; and, yes, the patents are invalid.

15 Thank y'all so much for your attention. This is an
16 important case to us.

17 THE COURT: All right. You've heard the arguments
18 from the Defendant. You'll now hear the final closing
19 argument from the Plaintiff.

20 You have 11 minutes and 20 seconds left, Counsel.

21 MR. CALDWELL: Thank you, Your Honor.

22 Mr. Albritton.

23 MR. ALBRITTON: Thank you.

24 MR. CALDWELL: May it please the Court?

25 THE COURT: Proceed.

1 MR. CALDWELL: Ladies and Gentlemen, does it bother
2 you at all how Apple stands up here and attacks Mr. Racz?

3 And I'd like to start with one thing right off the
4 bat.

5 Mr. Batchelder makes a big deal about the fact that
6 I didn't question Mr. Racz on that next day. I was sitting
7 there at dinner with his wife and I'm reading through the
8 cross-examination where they asked him about his personal
9 debts. They asked him if he invented the Internet. They
10 asked him if he invented screens. And they didn't once put
11 up a claim that actually outlines what he invented.

12 Why would I? What points? They had the ability to
13 cross him on anything they wanted. What points did they
14 score?

15 You heard in the instructions that the inventor may
16 possess something that distinguishes him. And I would submit
17 to you that you can't get much more true than that when
18 you're referring to Mr. Racz.

19 Ladies and Gentlemen, you've heard the word "truth"
20 quite a lot; and the Latin root of that word is verdict, to
21 say the truth. And it will shortly be time for you to write
22 down your verdict.

23 You've seen the evidence play out, and the truth is
24 becoming clear as the evidence piles up on one side or the
25 other. The evidence that actually goes to the claims,

1 actually goes to the validity, and actually goes to the
2 questions of damages that are on the form and in His Honor's
3 instructions.

4 The truth is in the code, and the truth shows that
5 Apple infringes. The claims are all valid, and not one thing
6 was clear and convincing about that presentation that
7 Mr. Wechselberger read a few days ago.

8 Finally, a very reasonable royalty is \$852 million.
9 And that's based on the actual evidence.

10 I'd like to respond to some of the arguments from
11 counsel.

12 Regarding infringement, Mr. Batchelder talked about
13 payment data. It looks like they're dropping that Akamai
14 argument we heard several times. Apple doesn't actually
15 supply the data you buy from -- from -- from Apple. It looks
16 like they're dropping that.

17 Also looks like Apple is dropping this argument
18 that we've heard over and over and over. There are no use
19 rules. It's just magic that your movie rental expires after
20 30 days or that you can't copy it from one device to another.
21 It looks like they've dropped that one, too.

22 And we're down to payment data.

23 May I have Slide 18, please, sir?

24 What you heard Mr. Batchelder argue -- I think this
25 typifies what you have to address as the jury in this case.

1 He argued to you: We don't store credit cards on
2 our phone. Have you seen credit card in any construction
3 from His Honor? There's the payment constructions on the
4 screen. Does it say storing credit cards? Have you seen
5 credit cards in any claim? There is no requirement in the
6 claim or in His Honor's instructions about storing credit
7 cards on a phone that makes it where Apple doesn't infringe.

8 Instead, what does the construction say for payment
9 data? Data that can be used to make payment for content.

10 And a payment validation system is a system that
11 returns payment validation based on an attempt to validate
12 that payment data. It's not validating a credit card. It
13 was validating what was sent up.

14 What did we see in the evidence? Dr. Jones walked
15 through the code. I won't repeat that part. We saw from
16 Mr. Mirrashidi. He agrees an Apple ID corresponds to the
17 DSID and that it's sent up to make purchases. And they agree
18 it's in every buy request message, the DSID, the GUID, the
19 MID.

20 And they also agree that it's validated because
21 Apple checks to see if there's enough store credit and a
22 valid credit card on file. Looking at that information,
23 that's how Apple's system works, and it meets the claims
24 precisely as explained by Dr. Jones.

25 Then we hear about invalidity. As I mentioned,

1 this hinges completely on Mr. Wechselberger, and I mean him
2 no disrespect but that jumbled mess we saw is not clear and
3 not convincing about anything.

4 It was very telling that he -- I understand Mr.
5 Batchelder says His Honor is going to instruct you on the
6 law, and I agree with that; but Mr. Wechselberger was on the
7 stand proving, he said, Apple doesn't infringe because of the
8 payment data and the patents should be taken away because of
9 the prior art.

10 He's actually looking at both validity and
11 infringement and didn't even know that on infringement,
12 Smartflash has a preponderance burden. On invalidity, Apple
13 has clear and convincing. He never took any of that into
14 account. Yet he wants you to take away -- throw away Mr.
15 Racz's patents.

16 If I could, could I have the document camera,
17 please, sir?

18 Ladies and Gentlemen, I think this, again, typifies
19 what you're seeing from Apple. Remember what was in the
20 instructions? You compare the prior art or the infringement
21 to the claims.

22 What did Mr. Batchelder do? He says: Well,
23 there's some pink boxes I can point to in the patent over
24 here on this side, and there's some pink box I can color in
25 over here on the left, so the thing must be invalid. But he

1 didn't go through the claims.

2 This very figure is one that I spent time going
3 through with Mr. Wechselberger; and when he found the right
4 slides that correlated to it, we talked about where data
5 went, which sequence happened, and not once did he actually
6 show you that the claims were met, that you read payment data
7 from the device.

8 You send the payment data to be validated by a
9 payment validation system. You get back payment validation
10 data. And in response to that, you get your content and
11 rules because it doesn't happen in Gruse. It has this large
12 sequence of steps that is not at all like the claims. And I
13 suspect that's probably why IBM is not the brand on the phone
14 in your pocket.

15 On this point about willfulness, Mr. Albritton
16 makes a big deal saying that we are blaming Mr. Farrugia for
17 everything. You were instructed that willfulness takes into
18 account lots of factors, including whether Apple has done
19 what's commercially reasonable and the viewer should have
20 known that they are infringing.

21 The one thing that's -- should be clear as day in
22 this case is that the folks at Apple who have the ability to
23 decide to respect Mr. Racz's patents, have buried their heads
24 so deep in the sand, they will not look at the patents.

25 That's plain as day. And Mr. Farrugia is one of

1 those decision-makers, and he gets up here and talks out of
2 both sides of his mouth. I didn't have the experience.

3 Okay. I did. It didn't come from Gemplus.
4 Actually it did. That's all the evidence you can consider on
5 willfulness. It's not about vilifying somebody.

6 Regarding damages, they keep showing you from Mr.
7 Racz documents from 2009. He didn't even have the '221
8 patent. He didn't even have the '772 patent that he got
9 later that covers the handheld multimedia terminals.

10 Why do they keep showing you those? And even in
11 2009-2010 when Mr. Racz didn't have those patents, even
12 then -- and even though he didn't have the money then to do
13 all the prosecution work -- patent prosecution work, it was
14 going to take to get them, nothing they showed you showed
15 that he was willing to just take a little lump sum and be
16 done with it, like Apple says.

17 They just want you to guess that. They didn't show
18 you a single document that confirms he would have taken a
19 lump sum. He steadfastly refused because he always wanted to
20 be involved, and he always thought that the fair way to be
21 compensated was with a reasonable royalty.

22 THE COURT: Three minutes remaining, Counsel.

23 MR. CALDWELL: Thank you, Your Honor.

24 That way, if the invention is successful with any
25 partner he has, or with a licensee if they choose to get

1 permission to use his ideas, he is paid proportionally.

2 Now, what they submit to you you should do for
3 damages is mind-boggling. Mr. Becker's theory is actually
4 let's pretend Mr. Racz never had an invention. He never
5 tried to do anything. He never had an invention. All he
6 did, instead, was he gave up his business on these water
7 filters. He took that money and threw it in the stock
8 market. He never took any risks. He didn't come up with
9 something that changed the world of technology. He just
10 through it in the stock market and after awhile, he decided
11 to take it out of the stock market and split part of it with
12 Apple.

13 It is the most irrational thing you could be
14 presented with. And that's why His Honor's instruction says
15 you have to look at the value of infringement to Apple.
16 You were told all he did was invent some way of buying apps.

17 When you go back, you know the claims, the four
18 claims: '720, 13; '221, 32; '772, 26 and 32; not one of
19 those is just an app claim. They are device claims. That's
20 why the base is exactly what Mr. Mills and Dr. Wecker
21 presented to you.

22 Can I have -- can I have Slide 102? Thank you.

23 And what you were shown was that asking the very
24 question that's in the instructions about what alone
25 motivated consumers, consumers spent -- just those who were

1 alone motivated for these features; and, of course, everybody
2 wants to use the phone on -- the feature, but that's on all
3 phones, right, the phone feature is? Do people who were
4 motivated to buy these devices constitute 23 percent of the
5 purchases, and that revenue is 43.4 billion? It's a big
6 number because it's very successful for Apple when they
7 infringe. And a reasonable royalty is 852.

8 Apple admitted, although they dispute the way the
9 rate was calculated, which is based on non-infringing
10 alternatives, they admitted and stipulated you can't switch
11 Steps 3 and 4, like they want. Oh, it's just 3 and 4. Let's
12 switch those. You can't.

13 The movie studios, there's no proof that movie
14 studios, book, anyone else will ever let you just go ahead
15 and send a content and hope to get paid later.

16 THE COURT: 10 seconds, Counsel.

17 MR. CALDWELL: Ladies and Gentlemen of the Jury,
18 fate has made many interventions in the life of Mr. Racz
19 since he had his great idea, and it wasn't always clear where
20 he was headed. But what's clear now is the United States
21 Patent Office has recognized his inventions. Fate brought
22 him here to stand before this jury. I applaud his resolute
23 determination.

24 On behalf of Mr. Racz and Smartflash, we look
25 forward to your verdict.

1 THE COURT: All right. Ladies and Gentlemen,
2 you've now heard the closing arguments from counsel from both
3 the parties. I have a few final instruction to give you
4 before you begin your deliberations.

5 Again, you must perform your duties as jurors
6 without bias or prejudice as to any party. The law does not
7 permit you to be controlled by sympathy, prejudice, or public
8 opinion.

9 All of the parties expect that you will carefully
10 and impartially consider all of the evidence, follow the law
11 as I've given it to you, and reach a just verdict regardless
12 of the consequences.

13 Answer each question in the verdict form from the
14 facts as you find them to be. Do not decide who you think
15 should win and then answer the questions accordingly.

16 Again, Ladies and Gentlemen, your answers and your
17 verdict in this case must be unanimous. You should consider
18 and decide this case as a dispute between persons of equal
19 standing in the community, of equal worth, and holding the
20 same or similar stages in life.

21 This is true in patent cases between corporations,
22 partnerships, and individuals.

23 A patent owner is entitled to protect its patent
24 rights under the United States Constitution. This includes
25 bringing a suit in the United States District Court for money

1 damages for infringement as we have here.

2 The law recognizes no distinction between types of
3 parties. All corporations, partnerships, and other
4 organizations stand equal before the law regardless of their
5 size, who owns them, and they are to be treated as equals.

6 When you retire to the jury room to deliberate on
7 your verdict, you will each have a copy of this charge, these
8 final jury instructions to take with you.

9 If you desire to review any of the exhibits which
10 the Court has admitted into evidence over the course of the
11 trial, you should advise me by a written note, delivered to
12 the Court Security Officer, and I will then send that exhibit
13 or those exhibits to you that you request.

14 However, certain documents that have been shown to
15 you during the trial were what we call demonstratives.

16 Demonstratives are a party's description, picture,
17 or model that's used to describe something in the trial.

18 If your recollection of the evidence differs from
19 the demonstrative, you should rely on your recollection.

20 Demonstratives are not evidence and they're not
21 able to be reviewed by you during your deliberations.

22 However, a witness's testimony that references the
23 demonstrative is evidence.

24 Once you retire, you should first select your
25 foreperson and then conduct your deliberations.

1 If you recess for any reason during your
2 deliberations, follow all the instructions that the Court's
3 given you about your conduct during the trial.

4 After you have reached your verdict, your
5 foreperson is to fill in your answers in the verdict form.
6 Those must be unanimous answers to the questions that are
7 found therein. Then the foreperson should date the verdict
8 form and sign it and finally deliver it to the Court Security
9 Officer.

10 Contrary to my earlier instructions, which I gave
11 you repeatedly throughout the course of the trial, it is now
12 your sworn duty to discuss the case among yourselves in an
13 effort to reach agreement, if you can do so.

14 Each of you must decide the case for yourself, but
15 only after full consideration of all the evidence with the
16 other members of the jury.

17 While you're discussing the case, do not hesitate
18 to re-examine your own opinions and change your mind if you
19 become convinced that you were wrong. However, don't give up
20 your honest beliefs solely because others think differently
21 or merely to finish the case.

22 Do not reveal your answers until such time as you
23 are discharged, unless otherwise directed by me. And you
24 must never disclose to anyone, not even to me, your numerical
25 division on any question.

1 Any notes that you've taken during the trial are
2 only aids to your memory. If your memory should differ from
3 your notes, then you should rely on your memory and not your
4 notes. The notes are not evidence.

5 A juror who has not taken notes should rely on his
6 or her own independent recollection of the evidence and
7 should not be unduly influenced by the notes of other jurors.

8 Notes are not entitled to any greater weight than
9 the recollection or impression of each juror about the
10 testimony.

11 If you want to communicate with me at any time
12 after you retire to deliberate, please give a written note or
13 message to the Court Security Officer, who will bring it to
14 me.

15 I will then respond as promptly as possible, either
16 in writing or by having you brought back into the courtroom
17 where I can address you orally. I will always first disclose
18 to the attorneys in the case your question and my response
19 before I answer your question.

20 After you've reached a verdict and I have
21 discharged you, you're not required to talk with anyone about
22 this case unless the Court orders otherwise.

23 However, Ladies and Gentlemen, you will then be
24 free to discuss it with anyone, if you choose to do so.

25 Whether or not you discuss this case or your

1 service as jurors after you have been discharged, is totally
2 and strictly up to you and you alone.

3 I'll now hand eight copies of the final jury
4 instructions and one clean copy of the verdict form to the
5 Court Security Officer to deliver to the jury once they
6 retire.

7 Ladies and Gentlemen of the Jury: You may now
8 retire to deliberate. We await your verdict.

9 COURT SECURITY OFFICER: All rise for the jury.

10 (Jury out.)

11 THE COURT: The Court stands in recess either
12 awaiting a note from the jury or a verdict in this case.

13 We are in recess.

14 (Jury deliberations.)

15 (Jury out.)

16 THE COURT: All right. Counsel, have a seat.

17 Do we have everybody here that's coming?

18 MR. CASSADY: We're trying to get Brad -- I'm
19 sorry, Mr. Caldwell.

20 THE COURT: I don't see Mr. Caldwell or Mr. Ward.
21 I see most of the defense counsel.

22 MR. CASSADY: Your Honor, I sent them a text
23 message. I'm not sure where they are.

24 THE COURT: All right. Well, we'll go ahead. They
25 can join us when they get here.

1 For the record, Counsel, I've just received a note
2 from the jury. It's marked Note No. 1, and it's dated
3 today's date, and it reads as follows:

4 Judge Gilstrap, we anticipate deliberations to take
5 several more hours. Should we set a stopping point this
6 evening or continue until we come to a conclusion tonight,
7 question mark?

8 It's signed by looks like Mr. Godwin as jury
9 foreperson.

10 It's 5:15. Certainly I would suggest that the jury
11 continue to work for some additional period of time. Do
12 counsel for either of the parties have any comments they'd
13 like the Court to consider?

14 MR. ALBRITTON: Whatever the Court's preference is,
15 is fine with us, Your Honor.

16 MR. CASSADY: Same here, Your Honor. Whatever Your
17 Honor deems is the right thing to do here.

18 THE COURT: Well, I have a pre-trial hearing in an
19 ANDA case set for 9:00 o'clock in the morning in Marshall,
20 and I have counsel that have traveled from both coasts to be
21 there.

22 So I'm reluctant to stop earlier than we have to
23 tonight. I also understand there is the threat of some more
24 inclement weather. I don't know exactly what the status of
25 that is, and I don't know what several more hours means,

1 whether that's two or whether that's 10, and they probably
2 don't know either.

3 My intention would be to return a response to the
4 jury that in effect says continue to deliberate. And, you
5 know, if you reach a point later this evening that you feel
6 you cannot continue or it becomes nonproductive, let me know
7 or something to that effect. I'm just speaking off the top
8 of my head. And I'll certainly put any response in writing
9 and let counsel see it before it goes back.

10 Do I have any suggestions to say anything
11 additional or anything different?

12 MR. ALBRITTON: Something like that sounds fine to
13 us, Your Honor.

14 MR. CASSADY: Sounds fine to us, Your Honor.

15 THE COURT: Okay.

16 MR. CASSADY: I would suggest -- if I may.

17 THE COURT: Please.

18 MR. CASSADY: If they're going to stay late, should
19 we order them food or give them the option of food? I mean,
20 I'm sure if you want to do that -- maybe you don't want them
21 to think they're going to be here forever, but I thought I'd
22 put it out there.

23 THE COURT: We'll -- we'll see how it plays out.

24 MR. CASSADY: Okay.

25 THE COURT: All right. Well, let's stand in

1 recess.

2 I'll hand Note 1 to the courtroom deputy to be part
3 of the record, and if you will stand by, counsel, when I get
4 some kind of written response crafted, I'll make sure you see
5 it and have an opportunity to approve or object on the
6 record.

7 We stand in recess.

8 (Recess.)

9 COURT SECURITY OFFICER: All rise.

10 THE COURT: Be seated, please.

11 Counsel, in response to the note from the jury,
12 which I read you just a minute ago, I have drafted a proposed
13 response. I'm going to read it to you, and I'll take any
14 comments from both parties as soon as I've read it.

15 Members of the jury, in response to your Note No. 1, both the

16 Court and counsel suggest that you continue to
17 deliberate. If you want dinner brought in, please advise the
18 Court Security Officer. You should attempt to reach a
19 verdict this evening if at all possible.

20 Anybody have any objection to that language?

21 Plaintiff?

22 MR. CALDWELL: No objection, Your Honor.

23 THE COURT: Defendant?

24 MR. ALBRITTON: No objection, Your Honor.

25 THE COURT: Then I'll reduce it to writing, sign

1 it, and deliver it to the Court Security Officer to be given
2 to the jury.

3 We stand in recess.

4 COURT SECURITY OFFICER: All rise.

5 (Recess pending verdict of the jury.)

6 (Jury out.)

7 (Court resumed at 8:40 p.m.)

8 COURT SECURITY OFFICER: All rise.

9 THE COURT: Be seated, please.

10 Would you bring in the jury?

11 COURT SECURITY OFFICER: All rise for the jury.

12 (Jury in.)

13 THE COURT: Please be seated.

14 Mr. Godwin, I understand you are the Foreperson of
15 the jury; is that correct?

16 FOREPERSON: Yes sir.

17 THE COURT: Has the jury reached a verdict?

18 FOREPERSON: We have, Your Honor -- we have, Your
19 Honor.

20 THE COURT: Would you hand the verdict form to the
21 Court Security Officer, who will bring it to me.

22 (Verdict given to the Court.)

23 THE COURT: Ladies and Gentlemen, I am about to
24 announce the verdict. I would like each of you to listen
25 very carefully, because once I have done that, I am going to

1 poll you and ask you if this is the verdict of each member of
2 the jury, so that we can confirm that the jury's verdict is
3 completely unanimous.

4 With that, I will turn to the completed verdict
5 form that has been delivered to me by the Foreperson of the
6 jury, Mr. Godwin.

7 I turn to the last page and see it is dated today's
8 date and signed by Mr. Godwin, as Jury Foreperson.

9 And then turning to the second page of the verdict
10 form:

11 Question 1: Did Smartflash prove by a
12 preponderance of the evidence that Apple infringes the
13 following claims of the following patents? Answer "yes" or
14 "no" for each claim.

15 For the '720 patent, Claim 13, the answer is: Yes.

16 For the '221 patent, Claim 32, the answer is: Yes.

17 For the '772 patent, Claim 26, the answer is: Yes.

18 And the '772 patent, Claim 32, the answer is: Yes.

19 Turning to Question 2 of the verdict: Did
20 Smartflash prove by clear and convincing evidence that
21 Apple's infringement was willful?

22 For the '720 patent, the answer is: Yes.

23 For the '221 patent, the answer is: Yes.

24 For the '772 patent, the answer is: Yes.

25 Turning to Page 4 of the verdict form, wherein I

1 find Question 3: Did Apple prove by clear and convincing
2 evidence that any of the asserted claims of the following
3 patents are invalid?

4 Claim 13 of the '720 patent, the answer is: No.

5 Claim 32 of the '221 patent, the answer is: No.

6 Claim 26 of the '772 patent, the answer is: No.

7 And Claim 32 of the '772 patent, the answer
8 is: No.

9 Turning to the last page of the verdict form,
10 wherein I find Question 4. The question is: What sum of
11 money, if now paid in cash, do you find from a preponderance
12 of the evidence would fairly and reasonably compensate
13 Smartflash for Apple's infringement of Smartflash's patent?

14 The answer is: \$532,900,000.

15 Again, the verdict form is signed by the Foreperson
16 of the jury, Mr. Godwin, and is dated today's date.

17 For the record, I will hand the verdict form to the
18 Courtroom Deputy to be made part of the file in this case.

19 Ladies and Gentlemen of the Jury: Let me poll you
20 and make sure this is the unanimous verdict of all 8 members
21 of the jury.

22 If this is your verdict as I have read it, would
23 you please stand.

24 (Jurors stand.)

25 THE COURT: Thank you. Please be seated.

1 Let the record reflect that all 8 members of the
2 jury immediately rose and stood in response to the Court's
3 question to poll the jury.

4 Ladies and Gentlemen, this now completes the trial
5 of this case. From the very beginning I instructed you about
6 not discussing the case with each other until you retired to
7 deliberate and then only among yourselves, not discussing the
8 case with anyone until I release you.

9 I am now releasing you from your service as jurors.
10 You are now free to discuss the case, if you would like, with
11 anyone.

12 By the same token you are also free not to discuss
13 it with anyone. The option is completely yours.

14 I can tell you that each of the lawyers who have
15 tried this case would be very interested in talking to you
16 about it if you want to.

17 But you need to understand the rules of this Court
18 are and the practice in this Court is that they cannot
19 initiate a conversation with you.

20 If you want to discuss the case with any of the
21 lawyers, you have to initiate the discussion with them. They
22 will not bring it up, they will not engage you, they will not
23 talk to you, or start a conversation.

24 If you choose not to discuss the case, you simply
25 just walk on by and do what you have had in mind to do to

1 begin with. If you want to discuss it, you are free to do
2 so, but the decision is completely and entirely yours.

3 I want you to know how very much the Court
4 appreciates and values your service as jurors in this case.

5 This is an important case to all of the parties.
6 It is important to our system of justice that trials like
7 this are able to take place; and they absolutely could not
8 take place without ordinary, working citizens, like each of
9 you, being willing to come and give of your valuable time and
10 serve as jurors in a case like this.

11 You have rendered very real and important public
12 service this week. You should feel justly proud of the role
13 that you have played in administering justice in this
14 country.

15 In a very real way you have helped preserve,
16 protect, and defend the rights that we as Americans enjoy.

17 It is no small thing, Ladies and Gentlemen, and you
18 have the sincere and genuine thanks and appreciation of the
19 Court.

20 As a matter of fact, my personal practice since I
21 have been on the bench is after receiving a verdict in a
22 case, when the jurors have been dismissed and discharged, I
23 request, just as a personal favor, if before you leave, you
24 go back to the jury room and give me just a couple minutes to
25 come in; and I would like to personally shake each one of

1 your hands, and I would like to personally tell you face to
2 face how much I appreciate your service and how important it
3 is.

4 I will not keep you more than a few minutes. I
5 know it has been a very long week; but if you would do me
6 that personal favor, I would appreciate it.

7 Also, understand you are not required to do that.
8 Now that I have released you, if you want to leave the
9 building, as soon as we recess in a minute, you will be free
10 to do that.

11 But if you will give me just a few minutes to come
12 thank you in person, I would certainly appreciate it.

13 This completes the trial of this case. We stand in
14 recess.

15 Thank you, Ladies and Gentlemen.

16 COURT SECURITY OFFICER: All rise.

17 (Jury leaves the courtroom.)

18 THE COURT: Counsel, this completes the trial of
19 this case. You are excused.

20 (Court adjourned.)
21
22
23
24
25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of our abilities.

/s/ _____
SHEA SLOAN, CSR, RPR
Official Court Reporter
State of Texas No.: 3081
Expiration Date: 12/31/16

February 24, 2015

/s/ _____
SHELLY HOLMES, CSR, TCRR
Deputy Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/16